# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1936

## No. 227

JOSE MATOS, PETITIONER,

*vs.*

ALONSO HERMANOS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

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[fol. 1] [Caption omitted]

**IN DISTRICT COURT FOR THE JUDICIAL DISTRICT OF SAN JUAN, PUERTO RICO**

Civil No. 11,143

ALONSO HERMANOS and JOSE RAMON and MANUEL ALONSO MUNOZ, Plaintiffs,

v.

JOSE MATOS, Defendant

Inexistence of Contract and Cancellation of Entries

COMPLAINT—Filed December 12, 1929

To the Honorable Court:

Now come Alonso Hermanos by its managing partners, Jose Roman and Manuel Alonso Munoz, who also appear in their private capacity, by their undersigned attorneys and bring this complaint against Jose Matos, and respectfully allege and set forth:

(a) That Alonso Hermanos is, and was on the first of [fol. 2] March, 1929, a civil agricultural partnership domiciled in the municipality of Rio Piedras, Puerto Rico, constituted by a public deed executed before the notary public of Bayamon, Enrique Marquez Huertas, the sole members thereof being Jose Ramon and Manuel Alonso Munoz, who appear in its behalf as well as privately, and constitute themselves into plaintiffs.

(b) That the defendant is a farmer and a resident of San Juan.

(c) That on March 1, 1929, Jose Matos on the one side and Alonso Hermanos, by its managing partners Jose Ramon and Manuel Alonso Munoz on the other, stipulated and covenanted as follows:

(1) Jose Matos was at the time owner and possessor of a herd of cattle, composed of 122 head of different nature, race, gender, ages and color, which he was to sell and totally sold to Alonso Hermanos for the lump sum of $18,000.

(2) Alonso Hermanos was to accept and took possession of the said 122 head of cattle, the price of which was to be paid in the following manner:

| | |
|---|---|
| By paying, as it did, in cash on the date of the contract, to Jose Matos, the sum of | $3,000.00 |
| By paying, as it did, the total price of an urban piece of property which Jose Ramon Alonso Munoz had sold to Jose Matos for the account of Alonso Hermanos, the price of which the former left in the possession of the latter as part payment of said cattle, as appears from public deed No. 71, executed April 3, 1929, before notary public of Bayamon, Enrique Marquez Huertas | 5,000.00 |
| Total | $8,000.00 |

The remaining ten thousand dollars were to be paid by Alonso Hermanos to Mr. Matos within two years, expiring March 1, 1931, with interest at 9 percent per annum, payable monthly after the same became due.

(3) That Jose Ramon and Manuel Alonso Munoz by virtue of their common interest in the business of Alonso Hermanos would secure the payment of the obligation for ten thousand dollars above mentioned with a voluntary mortgage on private property of their own, which mort- [fol. 3] gage they constituted by public deed No. 72 of April 3, 1929, executed before notary public of Bayamon, Enrique Marquez Huertas, on the following properties:

(a) Urban Property belonging to Jose Ramon Alonso Munoz, that is a lot with a front measure of 12 meters on Las Flores Street, Santurce, municipality of San Juan, and with 19 meters and 85 centimeters on its northern side, bounding with house number 56 of Octaviano J. Herrera; with 12 meters on the west and bounding with Ricardo Danes; and with 20 meters on the south and bounding with house number 52 of Octaviano J. Herrera; the area thereof being 239 square meters and 10 square centimeters. This lot contains a zinc roofed, one-story, reenforced concrete house, with garage and servants' quarters in the yard, and marked number 54 of the street mentioned.

And two properties of Manuel Alonso Munoz the description of which is as follows:

(b) Urban: Lot measuring 20 meters and 55 centimeters on the north; 20 meters 35 centimeters on the south; 12 meters on the east and west, or a total area of 245 square meters and 40 square centimeters; bounding on the north with lot number 18 of Octaviano J. Herrera; on the east with Las Flores Street and on the west with property of Jacinto Caballero. This lot is situated on the northern part of the ward of Santurce, municipality of San Juan, and contains a zinc roofed, one-story, reenforced concrete house, with garage and servants' quarters in the yard, and is marked number 16 of said street.

(c) Lot of 20 meters and 60 centimeters on the north, bounding with lot number 20 of Octaviano J. Herrera; of 20 meters, 55 centimeters on the south; and bounding with lot number 16 of Octaviano J. Herrera; of 12 meters on the east and bounding with Las Flores Street and of 12 meters on the west and bounding with Jacinto Caballero; its area being 246 square meters and 90 centimeters. This lot contains a zinc-roofed, one-story, reenforced concrete house, with garage and servants' quarters in the yard, and is marked number 18 Las Flores, Northern Santurce, San Juan.

[fol. 4] This mortgage was recorded in the Registry of Property of San Juan, first section:

As to property letter (a), at page 208 of volume 101, of Northern Santurce, property number 5122, fifteenth entry.

As to property letter (b), at page 54 of volume 104, of Northern Santurce, property number 5257, sixth entry.

And as to property letter (c), at page 56, of volume 104 of Northern Santurce, property number 5258, sixth entry.

(d) That on the first of March, 1929, when the sale of the above-mentioned cattle took place, the latter were apparently in good condition and that no notice was then given to the contrary by the defendant to the plaintiffs, who, having no knowledge of or experience in veterinary matters, were unable to discover at sight whether said cattle were suffering from any hidden disease.

(e) That long before the first of March, 1929, according to plaintiff's information and belief formed subsequently to said date, the herd of cattle sold by Jose Matos to Alonso Hermanos were suffering from tuberculosis, which is a contagious disease, and that, on information and belief,

from the 18th of March to December 6, 1929, out of the 122 head of cattle which constituted the aforesaid herd, 43 have died of said disease, to wit:

March 18th, one white and black cow;
18th, one dark yellow;
18th, one yellow;
24th, one light brown;
24th, one black and white;
27th, one light gray;
27th, one white;
27th, one black and white;
27th, one dark brown;
April 4th, one black and white;
4th, one yellow;
7th, one yellow and white;
19th, one dark brown, without horns;
23d, one dark brown and gray;
30th, one yellow with a protuberance in the jaw;

[fol. 5]

April 30th, one light gray;
May 14th, one light yellow;
23d, one light brown;
June 10th, one black;
25th, one black;
July 3d, one dark gray;
3d, one yellow;
3d, one spotted yellow;
15th, one dark brown;
20th, one black;
20th, one dark brown;
August 3d, one black with white spots;
19th, one black and white, named "La Policia";
19th, one dark brown and white, known as Guernsey;
Sept. 8th, one dark brown;
Sept. 30th, one yellow;
Oct. 18th, one dark brown and yellow;
25th, black and white (one);
Nov. 16th, one light gray;
Nov. 19th, one light gray;
20th, one dark brown and yellow;
21st, one dark gray;

Nov. 25th, one black;
26th, one dark brown and white;
30th, one black and white;
Dec. 1st, one light gray;
3d, one dark gray;
6th, one black and white.

And, further, after tuberculine, which is a test to determine the presence of tuberculosis in cattle, was applied by an official of the Health Department of Puerto Rico, it was found that 29 head more of the herd sold to Alonso Hermanos by Jose Matos were affected also by tuberculosis, contracted while the animals were in the possession of the defendant, according to plaintiffs' information and belief.

[fol. 6] (f) That the plaintiffs stand ready and willing to return to the defendant (and they hereby offer to do so) all of the surviving cattle which are a part of the entire herd sold to plaintiffs as above alleged on March 1, 1929, by Mr. Matos.

Wherefore the plaintiffs pray the court to enter judgment in due course declaring null and void, in accordance with Section 1397 of the Revised Civil Code, the contract for the sale of cattle to which averment letter (c) of the complaint refers, entered into by Jose Matos on the one side, and the agricultural civil partnership Alonso Hermanos and Jose Ramon and Manuel Alonso on the other side, under date of March 1, 1929, as well as the collateral mortgage constituted by the said Jose Ramon and Manuel Alonso Munoz in favor of Jose Matos by deed number 72, of April 3, 1929, before the notary public of Puerto Rico, Enrique Marquez Huertas, decreeing furthermore:

(1) That the Registrar of Property of San Juan, first section, cancel and set aside the entries made in the registry by reason of the mortgage deed hereinbefore mentioned as to property letter (a) above described, at page 208 of volume 101 of Northern Santurce, property number 5122, fifth entry; as to property letter (b) at page 54 of volume 104 of Northern Santurce, property 5257, sixth entry; and as to property letter (c) at page 56 of volume 104 of Northern Santurce, property No. 5258, sixth entry; and

(2) That Alonso Hermanos recover from the defendant the sum of $8,000, equivalent to the money paid in cash on account of the contract for the sale of the cattle mentioned in this complaint.

(3) That the defendant pay the costs and the disbursements of this action, including a reasonable sum as attorney's fees of the plaintiff.

San Juan, Puerto Rico, December 11, 1929.
Carlos del Toro Fernandez, E. Marquez, Attorneys for the Plaintiff.

*Duly sworn to by Jose R. Alonso. Jurat omitted in printing.*

[fol. 7] [File endorsement omitted.]

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IN DISTRICT COURT OF SAN JUAN

[Title omitted]

MOTION TO STRIKE OUT—Filed January 13, 1930

Now comes the defendant by its undersigned attorney and respectfully states and prays:

That the following particulars and paragraphs be stricken out from the complaint filed in the above-entitled case:

(a) From paragraph letter (d) the following:

"no notice was then given to the contrary by the defendant to the plaintiffs, who, having no knowledge of or experience in veterinary matters, were unable to discover at sight whether said cattle were suffering from any hidden disease."

(b) Paragraph letter (f) should be totally stricken out. It reads thus:

"That the plaintiffs stand ready and willing to return to the defendant (and they hereby offer to do so) all of the surviving cattle which are a part of the entire herd sold to plaintiffs as above alleged on March 1, 1929, by Mr. Matos."

[fol. 8] Grounds

The paragraphs of the complaint whose elimination is prayed for are redundant and irrelevant, and immaterial to the action herein brought. The complaint is based on Section 1397 of the Revised Civil Code.

(a) The notice that the defendant gave or that he failed to give to the plaintiffs, or the knowledge acquired subsequently to said date, can in no wise modify or alter the situation of facts that in accordance with the law may only give rise to a cause of action when said facts exist at the time the contract is entered into, provided the corresponding action is brought before the prescription of said right.

(b) Referring to paragraph letter (f) of the complaint we reproduce the same argument: It does not matter that the plaintiffs stand ready and willing or not, or that they offer to return or not, the cattle alleged to have survived. What a party stands ready to do after the execution of a contract is a fact subsequent to the celebration of the contract itself and in a case like the present this averment changes in no wise the situation of facts contemplated by the statute and existing at the time of the execution of the contract. Aside from that, the return of the things which are the object of the contract would be a corollary to the nullity or rescission of a contract in a proper case and that averment would be rather a question of law or the anticipation to the pronouncement of the judgment than a matter of pleading.

Wherefore the defendant prays this court that the elimination prayed for be ordered.

Rio Piedras for San Juan, Puerto Rico, January 11, 1930.

Heriberto Torres Sola, Attorney for the Defendant.

Copy served this thirteenth day of January, 1930.

C. del Toro Fernandez, Attorney for the Plaintiffs.

[File endorsement omitted.]

[fol. 9] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

DEMURRERS—Filed January 13, 1930

Now comes the defendant by his undersigned attorney and files the following demurrers to the complaint herein:

(a) That the complainant does not state facts sufficient to constitute a cause of action against the defendant, among other reasons because the action herein brought has prescribed.

In effect, under paragraph letter (c) of the complaint, the contract and the possession of the 122 head of cattle are alleged as taking place on March 1, 1929. The complaint is dated November 11, 1929, that is, nine months eleven days subsequently to the sale. The term of forty days within which the plaintiffs should have brought their action in accordance with the provisions of Sections 1397 and 1399 of the Revised Civil [Code], has elapsed in excess from the date of the delivery of the cattle in question and in conformity with said sections the action of the plaintiffs, supposing that it ever existed, would have prescribed.

(b) That the complaint is ambiguous, unintelligible and uncertain.

Grounds

Paragraph letter (e) of the complaint avers that "long before the first of March, 1929, according to plaintiffs' information and belief, formed subsequently to said date, the herd of cattle sold by Jose Matos to Alonso Hermanos, were suffering from tuberculosis". The same paragraph alleges that from the 18th of March to December 6, 1929, out of the 122 head of cattle which constituted the aforesaid herd, 43 had died. It is not alleged in an affirmative manner that the said 43 head had died of tuberculosis. This averment states that 43 head had died of same, but the phrase "of same" cannot be plainly understood to refer "to the herd of cattle sold", or to the alleged tuberculosis, which is claimed to be a contagious disease. This fact must appear plainly, because an animal, the same as

a person, though affected by tuberculosis, may die from any other disease. The complaint does not plainly allege either that the herd of cattle in question were affected by [fol. 10] tuberculosis at the time of the sale. It is true that in the first paragraph the plaintiffs refer "to the herd of cattle sold", but it does not appear plainly that the whole herd was subjected to the tuberculine test and that the same was found to be suffering from tuberculosis. It is alleged that 122 head of cattle were sold, that 43 head thereof died, but it is not plainly stated of what they died from. That after tuberculine was applied (it is not stated whether the same was applied to the whole herd or to some other 29 head) were found to be affected also with tuberculosis. It appears from the complaint that the 29 head of cattle found to be affected with tuberculosis contracted while the animals were in the possession of the defendant, but it is not alleged that they were in the possession of the latter before the sale was consummated, or at the time of the sale, for if they acquired tuberculosis in the possession of the defendant (sic) after the sale, that would be an irrelevant fact, for the law refers to a contagious disease existing at the time of the sale. It does not plainly appear either whether the cattle which the plaintiffs offered to return to the defendant were affected or not with said disease, nor whether it was so affected at the time of the sale.

Wherefore the defendant prays this Honorable Court that the complaint herein be dismissed and that the plaintiffs be sentenced to pay the costs, disbursements and attorney's fees.

Rio Piedras for San Juan, Puerto Rico, January 11, 1930.

Heriberto Torres Sola, Attorney for the Defendant.

Copy served this thirteenth day of January, 1930.

C. del Toro Fernandez, Attorney for the Plaintiffs.

[File endorsement omitted.]

[fol. 11] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

ORDER OVERRULING MOTION TO STRIKE AND DEMURRER—February 3, 1930

On the 20th ultimo the parties submitted to the consideration of the court the two questions raised by the defendant: a motion to strike out certain particulars of the complaint and a demurrer thereto for various reasons. Both parties have filed extensive briefs and counter-briefs.

As to the first ground of the demurrer, that is that the complaint does not state facts sufficient to constitute a cause of action, because from the face thereof it appears that the action has prescribed, as provided by Section 1397 of the Civil Code, the court overrules the same.

As to the second ground, that is the averment that the complaint is ambiguous, unintelligible and uncertain, the court finds no basis to sustain the same.

Coming now to the motion to strike out, the court finds that the particulars to which the defendant refers in his motion should not be stricken out, inasmuch as the former is a mere statement of the conditions of the plaintiffs and the second is an averment essential to the cause of action herein brought.

The demurrer as well as the motion to strike out are overruled and the defendant is granted a term of ten days to answer to the complaint.

Let the parties be notified.

Given in San Juan, Puerto Rico, this third day of February, 1930.

C. Llauger Diaz, District Judge.

The parties were notified this sixth day of February, 1930.

P. del Manzano, Clerk.

[fol. 12] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

ANSWER TO COMPLAINT—Filed February 14, 1930

Now comes the defendant, Jose Matos, by his undersigned attorney, and, without prejudice to his defense of prescription raised by the demurrers against the cause of action of the plaintiffs, answers in a correlative manner the averments of the complaint, as follows:

(a) The defendant accepts from this paragraph of the complaint that Alonso Hermanos on March 1, 1929, was an agricultural civil partnership domiciled in the municipality of Rio Piedras, Puerto Rico, but, owing to lack of sufficient information and belief as to the remaining averments of this paragraph to be able to answer the same, the defendant denies that on the date of the filing of the complaint Alonso Hermanos was such agricultural civil partnership, domiciled in the municipality of Rio Piedras, Puerto Rico, and for the same reason he also denies that said partnership was constituted by a public deed executed before the notary public of Bayamon, Enrique Marquez Huertas, or before any other notary; and for the same reason he denies that Jose Ramon and Manuel Alonso Munoz are or were the sole members of said partnership, and accepts that they appear in the complaint in behalf of the partnership and also that in their private name they constitute themselves into plaintiffs.

(b) The defendant accepts paragraph letter (b).

(c) The defendant admits that on the date alleged in paragraph letter (c) of the complaint the defendant Jose Matos on the one side and Alonso Hermanos by its managing partners Jose Ramon and Manuel Alonso Munoz on the other, stipulated and covenanted the alleged sale of the cattle of which the former was owner and possessor, for the price and under the terms and conditions alleged by the plaintiff; he accepts that the plaintiffs paid to the defendant the $3,000 corresponding to the first instalment, which sum was to be paid in cash. The defendant accepts that the second instalment of $5,000 was paid by the plain-

tiffs with the total price of an urban property transmitted to him by deed No. 71 of April 3, 1929, executed before Notary Public Enrique Marquez Huertas; but the defendant rectifies the averment of the plaintiffs and states that [fol. 13] the transfer of said urban property to the defendant, made by virtue of said deed and the contract that gave rise thereto, was not a separate and independent transaction entered into between Jose Ramon Alonso Munoz and the defendant, but as part of the same transaction for the sale of cattle with Alonso Hermanos, on account of the price of which the defendant agreed to accept, as he did, as part payment, the value of the said urban property. The defendant accepts that Alonso Hermanos agreed to pay the remaining $10,000 within a term of two years, which was to expire on March 1, 1931, with interest at 9 percent per annum, payable monthly after their expiration.

The defendant also admits that Jose Ramon and Manuel Alonso Munoz secured the performance of the obligation for $10,000 above mentioned with the mortgage constituted in favor of the defendant by means of public deed No. 72 of April 3, 1929, before Notary Public Enrique Marquez Huertas, on the properties described in the complaint under letters (a), (b) and (c); and that said mortgage was recorded, as alleged, in the Registry of Property.

(d) The defendant accepts that on March 1, 1929, when the sale of the above cattle was made the same were not apparently in good condition as alleged by the plaintiffs, but on the contrary that the cattle were then really and effectively in good physical condition; the defendant accepts that he gave at the time no notice to the contrary to the plaintiffs because the cattle being in good condition and not suffering from many vice or disease occult or apparent, he was not bound to give any notice in that regard; and the defendant denies, owing to lack of sufficient information and belief on the subject, that the plaintiffs, having no knowledge or experience in veterinary matters, were unable to discover at sight whether the said cattle were suffering from any hidden disease, the defendant alleging on the contrary that no matter how expert the plaintiffs might have been on the subject they would never have been able to discover in any form any hidden disease or vice in that cattle at the time of the sale because said cattle at the time was suffering from no vice or disease whatever.

(e) The defendant denies that at any time or moment prior to March 1, 1929, or on the date of the sale and delivery of said herd of cattle sold by the defendant to Alonso [fol. 14] Hermanos the same were affected totally or partially by pulmonary consumption or from any contagious disease whatever; and the defendant denies that within the dates alleged in the complaint, or on any other dates, the 43 head of cattle alleged in paragraph (e) of the complaint, or any head whatever, have died from same.

The defendant also denies, owing to lack of sufficient information or belief, that after tuberculine, which is a test to determine the presence of tuberculosis in cattle, was applied by an official of the Health Department of Puerto Rico, or by any other person or officer, it was found that 29 head, or any number of head, of the cattle constituting the herd sold to Alonso Hermanos by the defendant, were affected also by tuberculosis or by any disease contracted while the animals were in the possession of the defendant. And on the contrary the defendant alleges that if by means of the tuberculine test alleged by the plaintiffs, or by means of any other test, some of the cattle sold by the defendant to them were found to be suffering from tuberculosis or from any other disease, such disease or diseases were contracted by the said cattle subsequently to the dates of the sale made by the defendant and while the said cattle were in the possession of the plaintiffs.

(f) Owing to lack of information or belief with regard to the facts alleged in paragraph (f) of the complaint, the defendant denies that the plaintiffs stand ready and willing, and that they offer to do so, to return all the surviving cattle which are a part of the entire herd sold by the defendant, as alleged by the plaintiffs, on March 1, 1929; the defendant alleging on the contrary that he is not bound to receive said cattle.

New Matter

As new matter constituting an opposition and defense, the defendant alleges:

1. That all the cattle which were the object of the contract of sale of March 1, 1929, mentioned in the complaint, entered into with the plaintiffs or with Alonso Hermanos, was purchased by the defendant and sold in good faith,

without any vice or disease occult or apparent; and that the said sale was made after an examination was practiced of the cattle by the plaintiffs, who received the same to their [fol. 15] entire satisfaction and who did not make to the defendant any claim whatever until the complaint therein was brought.

2. That if subsequently to the sale of said cattle some of them have happened to be affected by tuberculosis or by some other disease, the defendant has not contributed to the determining causes thereof, while the plaintiffs have so contributed with their negligence or carelessness in moving the said cattle from the property on which they were grazing to a property in Rio Piedras situated near the Insular Sanatorium, known as "La Ruina", lacking stables and adequate structures for a dairy, the same as sufficient pasture, proper shade trees and water, and with other animals.

3. That the plaintiffs have been negligent besides by giving an inadequate treatment to the cattle in question, by failing to feed the same conveniently and to protect them from the rain and the sun.

Special Defenses

1. That the complaint does not state facts sufficient to constitute a cause of action, specially so to determine an action based on the inexistence of a contract.

2. Given the hypothesis that the plaintiffs, or any of them, have had on any occasion a cause of action against the defendant the same has prescribed, inasmuch as the action has been brought after the expiration of 40 days from the date of the delivery of the cattle to the plaintiffs, as provided by Sections 1397 and 1399 of the Revised Civil Code.

Wherefore the defendant prays this Honorable Court that judgment be rendered in due course dismissing the complaint herein and sentencing the plaintiffs to pay the costs and attorney's fees.

San Juan, Puerto Rico, February 13, 1930.

Heriberto Torres Sola, Attorney for the Defendant.

*Duly sworn to by Jose Matos. Jurat omitted in printing.*

[fol. 16] Copy served this fourteenth day of February, 1930.

C. del Toro Fernandez, Attorney for the Plaintiffs.

[File endorsement omitted.]

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In District Court of San Juan

[Title omitted]

Minutes of Ocular View

On June 21, 1930, the court went to "La Ruina", property belonging to the plaintiffs herein, in order to practice the ocular view prayed for by the parties. The latter, their attorneys and the officers of the court who sign these minutes were present.

Being on the property, the court notices the following: that the property is situated at a distance of about 200 meters, more or less from kilometer 16½ of the road leading from San Juan to Caguas.

In the stable—a zinc-roofed structure, mounted on steel posts—there are nine cows and a bull, which the parties accept are part of the cattle purchased from Mr. Matos. At a distance of 67.30 meters from the stable there is another structure measuring 60 by 40 feet, zinc roofed, supported on tree trunks and cocoanut palms. The west side of this structure is covered with boards, separated one from the other, the same as the south side, while the east and north sides thereof are covered with boards which are not separated. The court notices that the floor of this structure is of ground.

[fol. 17] From the place where these two stables are located to the Insular Sanatorium there is a distance which the parties figure at 6 or 7 kilometers.

The court examines also a brook which according to the parties produces the water used in the stables. The brook has an outlet that, the court notices, is fenced imperfectly, in order to avoid the cattle from coming near it. Close to the place just examined by the court there is a space, in the course of the brook, where there is an extension of water, through the middle of which the waters run, but remain still on the sides.

At the request of the defendant the court states that close to this place steps of animals are noticeable.

The defendant admits that below the place just described there is a watering place for cattle, in good condition, where steps of animals are also noticeable.

The court states, at the request of the defendant, that on this part of the property, close to the brook, the land is rugged and that there is found common or ordinary grass and some trees. The pasture of the rest of the property is equal to that of this section, except 15 acres of land which are planted to grass known as "elefante" and "malojillo". And the court makes to appear, at the request of the defendant, that there are on the property 122 head of cattle at large, grazing, independently from those in the stable, and that the "malojillo" and "elefante" grasses now growing are being resown and cut, respectively. On the banks of the brook there is some shade.

## Flor del Valle Property

The ocular view continues in Flor del Valle property, of the municipality of Bayamon, and once on said property the court notices, at the request of the parties, that there is a stable, that is a zinc-roofed structure, measuring 100 feet long by 72 feet wide, with its four sides open, excepting a small part which is enclosed on the northwest. The court also notices that there are a number of canoes in the stable.

The parties state that in Flor del Valle property there is no running water and that the supply of water for the prop- [fol. 18] erty is obtained from a deep well installed within the stable above described. The floor of the stable is entirely of concrete, with two lateral ditches for drainage.

The parties state that there are 80 head of cattle in the stable.

The attention of the court is called to the fact that on the shores of the mangrove swamp, at a distance of 500 meters more or less from the stable, to the northeast, the skulls of three animals of the bovine race were found. Further ahead, and still on the shores of the mangrove swamp, the court notices a great number of bones and three skulls of animals, also of the bovine race, as well as the remains of two more of said animals. The parties make to appear that the land is plowed and that a skull and some bones are found on the land that has been plowed.

At a distance of 800 or 1000 meters from the stable the court notices three head of cattle on the shores of the mangrove swamps, and it is the defendant's desire that it be made to appear in these minutes that the shore close to the mangrove swamp has been plowed. Following the shores of the swamp, contiguous to the property and in the same direction above referred to, the court finds the skulls of 9 animals of the bovine race, as well as a great amount of bones, and that the land has been plowed, although sugar cane is not planted close to the mangrove swamp. Following the shores of the swamp the court also finds seven additional head of cattle. The whole property is level and is planted to sugar cane.

As it was 12.30 in the afternoon the court considers the ocular view at an end and the parties state that there is nothing else that they want to be made to appear in the minutes of this ocular view.

The court orders that these minutes of the ocular view be added to the record of this case as a part thereof.

San Juan, Puerto Rico, June 21, 1930.

C. Llauger Diaz, Judge. P. Del Manzano, Deputy Clerk. Gilberto Cordova Davila, Deputy Marshal. Carmelo G. Perez, Reporting Stenographer.

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[fol. 19] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

STATEMENT OF FACTS AND OPINION

From the admissions contained in the answer, the court finds the following facts: that Alonso Hermanos, the plaintiff herein, is and was on March 1, 1929, a civil agricultural partnership domiciled in the municipality of Rio Piedras, and that the defendant is a farmer and a resident of San Juan; that on March 1, 1929, the defendant and the plaintiffs, by its managing partners Jose Ramon and Manuel Alonso, covenanted and agreed the purchase and sale of 122 head of cattle for the lump sum of $18,000, of which sum $3,000 were paid in cash and $5,000 in an urban property, which the plaintiffs transferred to the defendant, and the

balance was to be paid in a term of two years, maturing on March 1, 1931, with interest at 9 percent per annum, and payable monthly at their expiration; that Jose Ramon and Manuel Alonso Munoz secured the performance of the obligation for $10,000 with a mortgage constituted in favor of the defendant, duly recorded.

The plaintiffs allege and the defendant denies that on March 1, 1929, when the sale of the cattle took place, the same was apparently in good physical condition and that the plaintiffs, who had no knowledge or experience in veterinary matters, were unable to discover at sight whether the said cattle were suffering from any hidden disease; that long before March 1, 1929, most of the cattle purchased from the defendant were affected by tuberculosis, which is a contagious disease, and that 43 head of cattle had died up to December 6, 1929, it being necessary to kill 29 additional head of cattle, which were also affected with tuberculosis, according to examinations practiced by the officials of the Department of Health; that the plaintiffs are willing to return all of the surviving cat-le and they pray the court that the contract entered into by the parties with regard to the sale of the cattle be declared null and void.

The defendant impeaches the last averments of the plaintiffs and alleges that the cattle sold had no vice or disease, occult or apparent; that the said cattle, on March 1 or on [fol. 20] the date of the sale and delivery thereof, was neither totally nor partially suffering from pulmonary tuberculosis or from any other contagious disease; denies the death of 43 head of cattle and also that 29 other head of cattle had to be killed, and alleges as new matter that the plaintiffs have been negligent in the care of the cattle; that when the cattle was sold the same were in perfect condition; and finally that the plaintiffs moved the said cattle to a piece of property near the Insular Sanatorium; that the same was not provided with stables or other structures adequate for a dairy farm, and that there was not sufficient grass nor the proper shade and water. As special defenses the defendant alleges that the complaint does not state facts sufficient to constitute a cause of action and that, even if it did, the cause of action would have prescribed in accordance with the provisions of Sections 1397 and 1399 of the Civil Code.

The trial of this case took several sessions of this court and in the course thereof the parties produced extensive

oral evidence. Part of this evidence consisted in the testimony of experts.

It is well to analyze, before going ahead, and in a summary manner, the evidence adduced herein. The evidence for the plaintiff reveals substantially that the purchase of the cattle was made on March 1, 1929, and that the cattle were taken away in two sections; that the cows had to walk 10 or 12 kilometers from the place where they were to the farm of the plaintiffs; that the cattle were to be used for dairy purposes; that on the date of the sale it was noticed that various cows were coughing, had diarrhea and the milk coagulated in the udder; that within three weeks the cattle began to die; that 72 died, of which number 29 were ordered to be killed by the sanitary authorities, some of them because they were affected by tuberculosis and others because they were suspected of having that disease; that the cattle began to die on the 18th of March; that in July, Varas a veterinary surgeon came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it; [fol. 21] that the cows were purchased for the purposes of a dairy and Matos himself bought milk from the plaintiffs for some time after the sale.

The veterinary experts testified as to the condition in which they found the cows and as to the fact that they were suffering from pulmonary tuberculosis. The testimony of the experts is curious, for while some of them stated that the incubation period lasts months and even years, the more reliable consensus of opinion is that that period may last from two weeks to several months and that it is very difficult to determine whether the tubercular affection in the cattle is recent or old.

The parties also requested, and the court practiced, an ocular view of the properties where the cattle were and to which the same were taken by the purchasers, and in the record appear the minutes of this ocular view.

After the production of the evidence, the plaintiffs have filed a 30 page brief and the defendant a 105 page brief. Both briefs have been carefully read by the court.

There is no doubt that the animals which were the object of this suit died of a contagious disease, such as is pul-

monary tuberculosis. It is a settled fact that the appearance of the animal does not necessarily reveal its condition of health, in other words that a cow may be apparently sound and produce milk normally and nevertheless be suffering from tuberculosis; that to the cattle the object of this suit tuberculine was applied, and the result was a positive reaction in a certain number, which had to be killed; that the property to which the cows were taken was in fair hygienic condition and had sufficient water; that the autopsy practiced on some of the cows showed that a chronic cavernous condition existed which indicated that the cattle had been sick for a number of months; and finally that it is mighty difficult to state whether an animal apparently in good condition is suffering from tuberculosis or not.

The parties lay great stress upon the question of law involved and the court really believes that the determination of such question would settle this controversy, since the evidence supports the allegations of the complaint, namely that at the time of the transaction part of the cattle sold was suffering from a contagious disease. Said question [fol. 22] of law may be stated thus: Is the action exercised herein one of redhibition or one for nullity of contract?

The action is based on Section 1397 of the Civil Code, the two paragraphs of which read as follows:

"Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void when, the use or service for which they are acquired being stated, they are found to be useless therefor."

And commenting on this precept Manresa, in volume 10 of his Commentaries to the Spanish Civil Code, page 227, edition of 1905, says: "the question herein involved is not the liability incurred with a warranty, but the declaration of something unfit for a contract, based on strong reasons of public policy." In this regard it is convenient that we say something in reply to the theory of the defendant that inasmuch as all the cattle were not suffering from tuberculosis the contract should not be declared null and void. It is a principle of law that, in order that a contract exist, the three essential requisites of consent, object and consideration are necessary. Now, when a contract lacks any

of these essential requisites for its validity then the contract is null, that is it does not create the legal nexus established between the parties by the execution thereof, but there may be a case in which a contract with all these essential requisites for its validity, one of these requisites may be affected by a defect which invalidates the contract, and until the existence of such defect is shown the contract is valid and has to be considered as valid in law.

The question is plain to us. When the object of the contract is animals suffering from contagious diseases, the same is null. The precepts of the law are simple and there is no need of twisting it in order to find the hidden meaning it does not have. And the contract is null because it involves things that according to health and public hygiene are illicit articles of commerce. If a contract is entered into in these conditions, the object is lacking, and consequently there is no contract, inasmuch as one of its essential requisites is lack- [fol. 23] ing. The following question may then be made: If all the cows were not affected, is the sale null in so far as those that were sound are concerned? In order to answer the question it is necessary to determine why was the contract entered into, what were said cows to be used for. The evidence itself gives us the key, the cows were to be used for a dairy, that is for the business of milk production. This was the same business to which the defendant has been using them and it cannot be imagined that the plaintiffs paid the sum of money they paid for the 122 cows, if they were not going to use the cows in the same business. It is true that the complaint does not allege that it was part of the contract that the cows were to be used for a dairy. But this transaction was entered into verbally, and Alonso himself said in his testimony that the cows were purchased to be used for purposes of a dairy. If the cows were affected with tuberculosis, the Health Department acted according to law in closing the dairy and in preventing the sale of the milk, this being something which in our opinion should have been done many months before, in order to avoid the spread of such a terrible disease.

Now, the defendant insists that the action herein brought has prescribed inasmuch as the same has not been brought

Insert at bottom of Page 21 Transcript to substitute the words:— "In order to so decide the court holds that the action herein exercised is a redhibitory one", the words,— He bases his contention on the fact that the action herein exercised is a redhibitory one.

IN SUPREME COURT OF PUERTO RICO

No. 5793

ALONSO HERMANOS et al., Plaintiffs, Appellees,

v.

JOSE MATOS, Defendant, Appellant

Appeal from the District Court of San Juan

OPINION OF THE COURT

Delivered by Mr. Justice WOLF:

San Juan, Puerto Rico, April 6, 1934.

On the first of March, 1929, the parties in this case made an agreement whereby a sale of cattle was negotiated. The cattle were sold for the lump sum of $18,000. The purchaser, Alonso Hermanos, an agricultural partnership, paid $3,000 in cash to Jose Matos, the vendor, transferred to him a piece of property worth $5,000, and agreed to pay the balance in two years, to mature on the first of March, 1931. To secure the balance of the purchase price remaining unpaid, Alonso Hermanos executed a mortgage to Jose Matos, the deed for which was duly recorded.

[fol. 26] On December 12, 1929, the plaintiffs brought suit for the return of what they had paid and the extinction of their obligation to pay, alleging that the contract was null, void and inexistent, inasmuch as at the time of the supposed sale the herd of cattle was affected by consumption, occult and not apparent. The specific words of the complaint in this connection were:

"(d) That on the first of March, 1929, when the sale of the above mentioned cattle took place, the latter were apparently in good condition and that no notice was then given to the contrary by the defendant to the plaintiffs, who having no knowledge of or experience in veterinary matters, were unable to discover at sight whether said cattle were suffering from any hidden disease.

"(e) That long before the first of March, 1929, according to plaintiffs' information and belief, formed subsequently to said date, the herd of cattle sold by Jose Matos to Alonso Hermanos were suffering from tuberculosis, which is a con-

tagious disease, and that, on information and belief, from the 18th of March to December 6, 1929, out of the one hundred and twenty-two (122) head of cattle which constituted the aforesaid herd, forty-three have died of said disease, to wit:

* * * * * * *

"And, further, after tuberculine, which is a test to determine the presence of tuberculosis in cattle, was applied by an official of the Health Department of Puerto Rico, it was found that twenty-nine head more of the herd sold to Alonso Hermanos by Jose Matos were affected also by tuberculosis, contracted while the animals were in the possession of the defendant, according to plaintiffs' information and belief.

"(f) That the plaintiffs stand ready and willing to return to the defendant (and they hereby offer to do so) all of the surviving cattle which are a part of the entire herd sold to plaintiffs as above alleged on March 1, 1929, by Mr. Matos."

The defendant demurred, among other reasons, because the action had prescribed. The period of prescription on which the defendant relied is that specified in Section 1399 of the Civil Code (Comp. of 1911, Section 4505) as follows:

[fol. 27] "The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs."

The demurrer was overruled, and the defendant answered. He set up that at the time of the sale the cattle had no disease, occult or apparent. He denied that the forty-three cattle that were alleged to have died were affected by tuberculosis at the time of the sale, and alleged in effect that if they died it was by reason of the lack of care on the part of the plaintiffs and of the place or places where the latter had put the cattle.

The complaint did not set up a lack of good faith on the part of the defendant.

It may be said from a reading of the complaint and the brief of the appellees that the cause of action here is based exclusively on the idea that the sale was completely null and void and inexistent because a great part of the cattle was affected by tuberculosis at the time of the sale.

The plaintiffs insist that the action is based on Section 1397 of the Civil Code, which reads as follows:

"Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void when, the use or service for which they are acquired being stated, they are found to be useless therefor."

The court found that the sale took place on the first of March, 1929; that the cattle were taken away in two sections; that the cows had to walk ten or twelve kilometers to the farm of the plaintiffs; that the cattle were intended for dairy purposes; that on the day of the sale it was noticed that various cows were coughing, breathed with difficulty, had diarrhea, and the milk coagulated in the [fol. 28] udder; that within three weeks the cattle began to die, until 72 died, of which number 29 were ordered to be killed by the sanitary authorities, some of them because they were affected by tuberculosis and others because they were suspected of having that disease; that the cattle began to die on the eighteenth of March; that, in July, Varas, a veterinary surgeon, came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it; that the cows, so the court found, were bought for the purposes of a dairy and Matos himself bought milk from the plaintiffs for some time after the sale.

With regard to the testimony of the experts the court said:

"The veterinary experts testified as to the condition in which they found the cows and as to the fact that they were suffering from pulmonary tuberculosis. The testimony of

the experts is curious, for while some of them stated that the incubation period lasts months and even years the more reliable consensus of opinion is that that period may last from two weeks to several months, and that it is very difficult to determine whether the tubercular affliction in the cattle is recent or not."

The court said, without specification of how many, that the animals the object of this suit died of a contagious disease such as is pulmonary tuberculosis; that it was a settled fact that the appearance of the animal does not necessarily reveal its condition of health; in other words, that a cow could be apparently sound and produce milk normally and nevertheless be tuberculous; that to the cattle the object of this suit tuberculine was applied, and the result was a positive reaction in a certain number, which had to be killed; that the property to which the cows were taken was in fair hygienic condition and had sufficient water; that the autopsy made on some of the cows showed that a chronic cavernous condition existed, which indicated that the cattle had been sick for a long time.

Then the court places the issues in this case as follows:

"The parties lay great stress upon the question of law [fol. 29] involved, and the court really believes that the determination of such question would settle this controversy since the evidence supports the allegations of the complaint, namely, that at the time of the transaction part of the cattle sold was suffering from a contagious disease. Said question of law may be stated thus: Is the action exercised herein one of redhibition or one for nullity of contract?"

The court proceeds to discuss the issues and among other things decides that the contract was null, void and inexistent; that the parties knew that the cattle were to be used in a dairy; that is to say, the court was of the opinion that the sale should be considered as an entirety, inasmuch as the cows were to be used for a dairy, and this fact was known to the defendant. The court therefore held that the sale was void as an entirety. The use to which the cattle was to be put was not alleged in the complaint to have been specified in the contract, the condition set out in the second paragraph of Section 1397.

The court thought that the prescriptive period of forty days was not necessarily to be applied in Puerto Rico and that in any event the contract was entirely void because it lacked an adequate consideration. The court based its decision on Section 1397, supra.

For convenience, we shall first discuss the final issues in the case, disregarding, for the moment, the demurrer.

Section 1397 of the Civil Code, on which the plaintiffs rely, is placed in a chapter the title of which is as follows:

"Warranty against defects of or burdens on the thing sold."

A better translation of the Spanish would be:

"Warranty against hidden defects or encumbrances of the thing sold."

The appellant argues that the title shows that all sections within it refer to warranties, that an action for a breach of warranty in cases of animals must be exercised within forty days, as provided in Section 1399, supra; and that the action herein exercised is one of redhibition.

On the contrary, the appellees maintain that Section 1397 [fol. 30] of the Civil Code is absolute in its terms and that the accident of its being placed under a chapter entitled as we have seen could not affect such an absolute situation; that the theory of the said section, as explained by the commentators, is to make a contract totally inexistent, prescription not being, therefore, applicable.

Section 1397, supra, says that animals suffering from contagious diseases shall not be the object of a contract of sale. This is the written law in Puerto Rico and it was equally the law of Spain. Section 1494 of the Spanish Civil Code is exactly the same as ours. There is no doubt that tuberculosis would be one of the contagious diseases referred to in Section 1397.

Tuberculosis in cattle may be communicated to human beings through the milk and by other means unnecessary to enumerate. The disease is similar in its effects to tuberculosis in man but the contagion that is transmitted by cattle to human beings does not exhaust the realm of tuberculosis that may be contracted. The evidence of the experts in this case tended to show that a cow may be affected by tuberculosis and continue to yield good milk; that it is only after

the disease reaches a certain stage that the milk itself is a bearer of disease.

In 1902 the Civil Code of Puerto Rico was adopted. The mind of the Legislature was not specifically fixed on the disease of bovine tuberculosis. If we investigate the history of the legislation in regard to the vices for which the vendor gave a warranty, we shall find that universally vices in animals giving the purchaser a cause of action were characterized as redhibitory. This was true from the time of Ediles in Rome. The Latin word redhibitio means a return of the thing sold, or sometimes of part of the thing sold, with a right to obtain all or a part of the price paid. A vice in an animal causing the annulment or the rescission of the sale has always been considered as redhibitory, at least up to the enactment of the Civil Code of Spain of 1889, and hence of that of Puerto Rico. It may be noted that in the proposed bill (proyecto) of 1851 there were certain redhibitory vices pointed out, and tuberculosis in cattle was one of them. The French legislation follows the same course.

Louisiana has written a definition into its code as follows:

[fol. 31] "Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."

C. C. Art. 2520. (Henderson v. Leona Rice Milling Co., 160 La. 597, 107 So. 459.)

The plaintiffs themselves in bringing this action offered to return all the cows that remained in their possession, because in their opinion the whole contract was null, void and inexistent by reason of the presence of tuberculosis and of the fact that the cows were intended for a dairy. In other words, the learned counsel for the appellees realized that in order to have a possibility of success in their suit they were bound to return or offer to return the animals, the subject of the contract, whether diseased or not. Whatever else it may be characterized or whatever else may be the effect of Section 1397, the action for the nullity mentioned therein is necessarily a redhibitory action. If the vendor refuses to return the price and receive back the ani-

mals, the purchaser has to bring an action, and that action is a redhibitory one, whether the thing attempted to be sold can or can not be the subject of a contract by reason of Section 1397. The idea of the plaintiffs here was that, as a great part of the animals were diseased, the whole contract was void.

Some of the commentators on the Civil Code apparently say, especially when discussing the question of prescription, that Section 1397 makes the contract absolutely inexistent, implying, therefore, that no prescription runs. 10 Manresa (4th ed.) 229; 24 Laurent 109; 1 Gasca, infra. Other commentators do not agree with this interpretation. The most poignant commentary is made by Scaevola at page 668 of volume 28 of his Commentaries on the Civil Code, as follows:

"We repeat that no contract can be annulled by reason of redhibitory defects, and even less because of those mentioned in article 1494 than by reason of those set out in article 1484. We add that if article 1484 in fact attempted [fol. 32] to establish the nullity, it is in open conflict with article 1494 and with those which regulate the consent in general.

"We prefer, therefore, to think that 'Homer slept'; that nothing else was intended than to apply specifically to the sale of animals or cattle what was already provided for all kinds of alienations in general; that, in so doing an uncalled for repetition was incurred; and that, as it generally happens in such cases, in saying what was not needed it was ended by saying what should not have been said. Let it be understood, then, that when the contract we are discussing is declared to be void it has been intended to characterize it as 'voidable' (*rescindible*) subject to a redhibitory action as in the case of any other contract where the thing sold lacks fitness."

Let us take an example particularly germane to this case. A sale of a cow is made and both parties are acting in good faith. Nevertheless, after a while, either by his own observations or the intervention of the health authorities the buyer learns that the cow has incipient tuberculosis. However, the cow is exceptionally good and the purchaser desires to retain it. Under all the authorities he could not retain the cow and get back the price. To recover the price

he must return the animal. It is entirely at his election to retain the cow.

No different rule could apply where cattle are sold in bulk. Both parties have entered into a discussion as to whether the sale in bulk (precio alzado) could affect the questions before us. The appellees maintain that as a great part of the cattle was affected, the whole sale was void or voidable. The appellant insists that Section 1397 only applies at best to the cattle actually diseased, and that each animal must be considered separately.

In Louisiana it has been said that a warranty is of the nature of the contract of sale; that is, the law implies it, if a contrary agreement be not made; but that it is not essential to such a contract; that the vendor may stipulate he will not warrant at all, or he may covenant that his warranty shall be restricted, or he may contract that his vendee shall accept the warranty of a third person. Strawbridge [fol. 33] v. Warfield, 4 La. 20. A similar ruling was made in Bayon v. Vavasseur, 10 Mart. (O. S.) 61, 66.

This brings us to another point. The appellees attempt to say that Section 1397 stands for itself and that it makes the contract absolutely non-existent. Nevertheless, the said section is contained in a chapter which speaks of warranty for the hidden defects or encumbrances of the thing sold.

We, therefore, come to the conclusion with Scaevola that necessarily the legislator meant to say that the contract could be rescinded or annulled as in other redhibitory actions, and that Section 1397 does not exclude the transaction made in this case from the field of warranties.

Likewise, the parties by stipulation may make redhibitory those defects which are not so ordinarily. This has some tendency to show that the word "redhibitory" has a recognized standing or position in the law. It is another straw involving the idea that an action which involves the return of defective property should be considered as redhibitory.

The nature of a redhibitory action is shown in Childs v. Wilson, 15 La. Ann. 512, where the court said:

"The plaintiff does not sue to avoid the sale, and recover back the notes given for the price; in other words, this is not a redhibitory action; but he sues for the price, without seeking to disturb or annul the contract of sale, under

which the horse and mule came into his possession, and under which he executed and delivered his notes to the defendant. This the plaintiff can not do; before he can recover the price, or the notes given for the price, he must sue for and obtain, in the form prescribed by law, the avoidance of the sale."

It is presupposed always that the animal subject to redhibition should be returned if a return can be made. While in the present case there are fifty cows left, and the evidence tended to show that they were sound, the plaintiffs acted on the theory that they were returnable because the herd was bought for a dairy, and attempted to return them. Thus the action they attempted to set up was necessarily redhibitory.

[fol. 34] Falcon in volume 4, page 230, of his work on the Civil Code, says, with respect to redhibition, as follows:

"As the hidden defects which give rise to the warranty have always been called redhibitory vices, the warranty obtaining in such cases is similarly named, and likewise the action available to the vendee. The effect of redhibition is that the vendee may elect to rescind the contract or demand a proportional reduction of the price. If he elects the former, the vendee and the vendor must restore to each other, respectively, the thing sold and the price, and in addition thereto, the expenses which the purchaser may have incurred must be reimbursed to him. If he elects the latter remedy, in the absence of a contrary stipulation, experts appointed by both parties will determine the amount of the depreciation occurred in the thing sold by reason of the hidden defects or encumbrances discovered therein.

* * * * * * *

"When the thing sold is lost on account of the hidden defects, the loss falls on the vendor, who must return the price, and pay the expenses incurred, with damages, if he acted in bad faith.

* * * * * * *

"The sale of animals is subject to most special rules by reason of the frequency of hidden defects and the greater ease with which they can be concealed. Because of this the rules enacted by the codes are quite special. Some of

the codes specify the hidden vices or diseases which are designated as redhibitory and thus give rise to a warranty. Accordingly, they group cattle in various classes. It was so proposed in our project for the Code of 1851, and accomplished by the Austrian and Bavarian codes. The majority merely set forth the general rule, which in the case of some, such as the French Code, has been supplemented by special legislation. This is the system adopted by our own code, and article 1496 thereof had a future law in contemplation when it referred to vices or defects specified by law.

"Where several animals are sold together and redhibi- [fol. 35] tory vices are discovered in some of them, the warranty operates only as to the latter; but this rule does not apply where it clearly appears that the vendee would not have purchased all of the animals had he known that some were defective—as in the case of teams of horses or of mules, yoke of oxen, and other animals dealt in pairs.

"In sales of cattle made at fairs or at public markets the warranty against hidden vices does not obtain, except when the animals are suffering from contagious diseases, or when the service for which the animals are intended having been stated in the contract, they are found later to be useless therefor."

In his commentaries on the Spanish Civil Code, volume 4, page 507, Don Leon Bonel y Sanchez, referring to Section 1494 of the Spanish Code (equal to Section 1397 of our code) points out that pulmonary consumption is considered as a redhibitory vice in cattle.

In the notes to the French codes edited in 1861, the first redhibitory defect in cattle mentioned is pulmonary tuberculosis.

In the second volume, page 13, of his work "De la Vente", Troplong says: "If the animal is affected with a contagious malady, redhibition takes place." And again: "Outside of contagion, which is a redhibitory vice for all (animals) * * *", and then the author proceeds to specify other diseases that may be considered redhibitory.

Martinez Ruiz says at page 362 of volume 9 of his commentaries on the Civil Code:

"In all of the articles considered in this commentary mention is made of redhibition, that is, of the vendee's

right to rescind the contract. This is not, however, the only right given to him to compensate whatever damages the vices or defects of the animals sold may have caused him. Article 1499 makes extensive to sales of cattle and other animals the provisions of article 1486, under which the vendee may elect—without anything to limit this right of election—to withdraw from the contract, the expenses which he may have incurred being returned to him, or be reimbursed a proportional part of the price, according to the judgment of experts.

[fol. 36] "The time within which any of these actions—whether for rescission of the sale, or a diminution of the price—must be exercised is not the one provided in article 1490, but that established by the customs of the locality or, in the absence of these, that fixed by article 1496—forty days."

In volume XXVI, page 884, of the Enciclopedia Juridica Espanola, a redhibitory action is defined as follows:

"An action of the Roman Law available to the vendee in a contract of sale.

"According to a special provision of the aedelician edict, the vendor was responsible for all hidden defects (*morti vitra*) which the thing sold had at the time of the contract, even though they were unknown to him and he was likewise responsible for all the stipulated qualities which the thing should have or should not have (*dicta promissa*). So that when the thing sold had hidden defects or when the *dicta* and *promissa* qualities were not established, the vendee might always elect either to demand the rescission of the contract or a diminution of the price, both where the defects were capital as well as where they were secondary.

"In the former case the action exercised was the '*actio redhibitoria*' which prescribed in six months when the vendor had given bond for the defects of the thing sold and in two months when it was otherwise. The redhibitory action could be resorted to only once. * * *

"Our private law has substantially adopted the redhibitory action when authorizing the rescission of contracts of sale by reason of defects in the thing sold, under the general Civil Law as well as under the special Commercial Law, and it distinguishes between defects easily detected

upon examination by the vendee and hidden defects when fixing the period of time available for the rescission."

We have also before us a work on sales by the Italian commentator Gasca, translated into Spanish. Commenting on similar provisions of the Italian code, he says:

[fol. 37] "The sale is void when the subject-matter thereof, which coincides with its object, is contrary to law or public order. (Article 1122 of the Civil Code.)

"It is void because, the things alienated being outside the commerce of man, the vendor would act fraudulently in selling them; also because the sale can not be valid when it constitutes a crime or a violation of law.

"In my opinion the judgments which regard the infectious or contagious disease of an animal as a redhibitory vice are defective and wrong. Undoubtedly the absolute nullity of the contract of sale in such cases should not be declared except after it has been proved that the germ of the disease antedated the contract, since the animal could have contracted the disease after the sale. But once such proof is established, whether the vendor acted in good or bad faith, the sale should not be avoided only by reason of the exercise of the redhibitory action, but it should be adjudged null and void for lack of the thing which according to law may be the object of the sale." (Page 357.)

And possibly more to the same effect. The author, however, cites three decisions of courts of cassation of Italy which do not agree with him. And he himself does not give the reasons for his conclusion.

For our purposes it would be well to transcribe the whole chapter on warranty for hidden defects:

"Sec. 1387. The vendor is bound to give a warranty against hidden defects which the thing sold may have should they render it unfit for the use to which it was destined, or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and who by reason of his trade or profession should easily perceive them.

"Sec. 1388. The vendor is liable to the vendee for the warranty against faults or hidden defects in the things sold, even when they should be unknown to him.

[fol. 38] "This provision shall not obtain if the contrary should have been stipulated and the vendor should not have been aware of said faults or hidden defects.

"Sec. 1389. In the cases of the two preceding sections the vendee may choose between withdrawing from the contract, the expenses which he may have incurred being returned to him, or demanding a proportional reduction of the price, according to the judgment of experts.

"If the vendor knew of the faults or hidden defects in the thing sold and did not give notice thereof to the vendee, the latter shall have the same option, and furthermore, be indemnified for the losses and damages should he choose the rescission.

"Sec. 1390. If the thing sold should be lost on account of hidden faults and the vendor was aware of them, he shall bear the loss, and return the price and pay the expenses of the contract, with losses and damages. If he was not aware thereof, he shall only return the price and pay the expenses of the contract which the vendee may have paid.

"Sec. 1391. If the thing sold had any hidden fault at the time of the sale, and should be lost afterwards by a fortuitous event or by fault of the vendee, the latter may demand of the vendor the price he paid, deducting the value the thing had when lost.

"If the vendor acted in bad faith, he must pay losses and damages to the vendee.

"Sec. 1392. There shall be no liability for losses and damages in judicial sales, but all the other provisions of the preceding section shall be applied.

"Sec. 1393. Actions arising from the provisions of the five preceding sections shall be extinguished after six months, counted from the delivery of the thing sold.

"Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the [fol. 39] others, unless it appears that the vendee would

not have purchased the sound one or ones without the defective animal.

"This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same.

"Sec. 1395. The provisions of the preceding section, with regard to the sale of animals, is understood as applicable also to the sale of other things.

"Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, except in the case prescribed in the following section.

"Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.

"Sec. 1398. If the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

"But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable for losses and damages.

"Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

"Sec. 1400. If the animal should die within three days after being bought the vendor shall be liable, provided the disease that caused the death, in the judgment of veterinarians, existed before the contract.

[fol. 40] "Sec. 1401. If the sale has been rescinded the animal must be returned in the condition in which it was

sold and delivered, the vendee being liable for any injury due to his negligence and which does not arise from the redhibitory vice or defect.

"Sec. 1402. In the sale of animals and cattle with redhibitory vices the vendee shall enjoy the privilege mentioned in section 1389; but he must make use thereof within the same period which has been respectively fixed for the exercise of the redhibitory action."

As will be seen, section 1393 fixes a period of six months for the prescription of ordinary warranties. Section 1399, however, requires that a redhibitory action for vices or defects in animals should be brought within forty days. This is a universal provision which necessarily applies to redhibitory vices, whether in the nature of a contagious disease or not.

It is almost unimaginable that the purchaser of a cow should have the right to rescind or annul the sale for one, two, three or more years after taking possession of the animal. It is inconceivable that a man might milk the cow for two or three years, be perfectly satisfied with it, and then return it because it had tuberculosis. Scaevola says that he can not conceive that by reason of a contagious disease the limitation should be changed from forty days to four years. 23 Scaevola, page 666. In other words, he had the idea that even for contagious diseases prescription should run, that is to say, that at some time the action would prescribe. It may not be held, as maintained by the appellees, that there was never any period of prescription in the case. If the action could prescribe in four years, there is no reason why the Legislature should not fix forty days in cases of contagious diseases. This for us is the principal point in the case.

What the legislature in Spain had in mind probably was that a contagious disease would manifest itself within forty days. No particular attention was given to the thought that a longer time might perhaps be necessary where tuberculosis was concerned. In any event the statute fixed forty days unless the local usages required a different period. Ad ea quae frequentious accidunt jura adaptantur. So [fol. 41] much was this so that at the time of the preparation of the proposed bill of 1851 the veterinary experts thought that fifteen days was a reasonable time within

which to bring a redhibitory action on account of bovine tuberculosis.

Referring to the defective legislation we are now considering, Scaevola says:

"This subject of the sale of animals has been brought into the Code in fragments, which form a veritable juridical crazy-quilt, made up of all sorts of materials and hues. The contrast exhibited by the provisions as against each other is as striking as it is queer; the deficiencies noted are as numerous as they are regrettable; and were it not for the fact that, in reality, notwithstanding their divers origin and the independence with which they clothe themselves, they all respond essentially to very well known and old principles which are identified through them, it would be practically impossible at times to ascertain the intention of the legislator.

"The two articles which we have before us (corresponding to articles 1396 and 1397 of the Civil Code of Puerto Rico) are good proof of these conclusions, for, looking at their phraseology only, they appear to seek entirely different purposes, whereas essentially they are perfectly consistent. As regards the legal terms they use and the accuracy of their provisions, they are likewise objectionable. Thanks to the good fortune that these articles apply to causes, which are generally of small import and can be determined in oral trials ('juicio verbal'), the consequences will not be very serious. Otherwise, both these articles and all which follow in the same section would render themselves famous in the annals of Judicial administration." (Id. page 655.)

This crazy-quilt (edredon), as Scaevola characterized it, has impelled us to make a wider examination of the authorities than is ordinarily necessary.

Up to 1889, when the Spanish Civil Code was passed, it may be noted that the time in which a redhibitory action [fol. 42] should be brought was a limited one: from time immemorial a period of not more than six months. If by Section 1397, to take the extreme case, the legislator thought that the existence of a contagious disease would render a contract for the sale of cattle non-existent, did the legislator show any intention of preventing such an action from ever prescribing? As some of the commenta-

tors say, it seems inconceivable that the intention was to prevent such an action from prescribing or relegate the prescription to the term of four years determined by the chapter on the nullity of actions, or to the period of fifteen years provided in the code for the limitation of actions when no term is otherwise provided.

As the prescription of forty days was first introduced into the code along with the reformed precept of Section 1397 (1494 of the Spanish code) the strong probability is that the legislator thought that a shorter period than formerly was advisable. We have elsewhere made the comment that the Spanish legislator probably did not have tuberculosis in mind. The only way to harmonize the whole matter is to conclude that the legislature continued to think that the obligation incurred by a vendor of cattle with a contagious disease was responsive to a redhibitory claim that the purchaser had, and the legislature also had in mind that the period of prescription for all redhibitory actions, including those involving animals affected with contagious diseases, should be short. For other occult vices in sale of property the prescriptive period of six months prevails. The way to harmonize the whole chapter is to declare that the legislature was fixing different periods of prescription for every occult vice enumerated therein; in other words, a period of six months for ordinary vices and a period of forty days when animals were involved. It may even be that the legislature had in mind contagious diseases in animals when it fixed the prescription of forty days, inasmuch as most diseases of that nature would come to light before that time.

The introduction in 1889 of a period of prescription of forty days and the enactment of Section 1397 at the same time would be a strange coincidence, if they had no relation to each other.

We shall not give a great amount of attention to the [fol. 43] contention that the complaint failed to state a cause of action. What the appellant apparently maintains is that, as a part of the cattle, some fifty or more in number was not shown to be diseased, the theory of the action could not prevail or at least could not prevail for the cattle not shown to be unsound.

We think that the demurrer lay. If the court below and the appellees were right that the whole sale as an entirety

was annullable because of contagious diseases in a majority of the animals, then, of course, the complaint was good. We have the idea that when cattle are sold, even for a dairy, the animals are sold individually. It is a distributive sale. It makes no difference that the sale was for a lump sum. With the exceptions noted in the chapter, only the cattle affected with a redhibitory vice, under all the codes and the commentators that we have seen, may be returned.

Our notion of a dairy is that cattle are continually being bought and sold for its purposes, and the complaint does not allege that the business of a dairy could not commence or proceed by reason of occult vices in the animals or that if animals died they could not be replaced. As we see it, as soon as one cow died another could be purchased or the business go on without any new acquisition. Furthermore, the complaint does not distinctly set forth that the cattle were to be used for a dairy. Besides, whenever cows are bought in bulk in the majority of cases they are bought for a dairy or for similar purposes.

Likewise we thing that, given the attitude of the appellees in basing their action exclusively on Section 1397 of the Civil Code, the motion to strike presented by the defendant ought to have prevailed in certain particulars. For example, all matters which related to the knowledge or lack of knowledge of the plaintiffs when purchasing the cows. That knowledge was totally unimportant under Section 1397. On the other hand, the appellant also moved to strike from the complaint what was said with regard to an offer by the plaintiffs to return the remaining cows. The averment was important, it seems to us, for the proper purposes of the defendant in attempting to show that the action was redhibitory and had prescribed.

[fol. 44] In view of the fact that the judgment must be reversed in any event, we shall give no further attention to the motion to strike.

For similar reasons, although the complaint might be considered unintelligible and ambiguous in certain respects, we shall not discuss the matter.

Coming then to the trial of the case, our final conclusion is that from the evidence the court had a right to find that a great number of the cows sold were affected by tuberculosis at the time of the sale. Independently of the state-

ments of the witnesses or of the principal witness, Alonso, the preponderance of the evidence satisfies us that the disease was not contracted after the sale, at least with respect to a number of the cows. Existing, as it did, in some cases in advanced form the court had a right to decide the facts as it did.

We shall not give great heed to the moral questions involved. Presuming, as we must, the good faith of both parties, the position of either of them was hard. If, for example, some of the cattle had tuberculosis which would make no progress, technically the purchaser had a right to rescind the sale within forty days. For him, however, it would be exceedingly hard that the cattle should die on his hands after two or three months of use on account of tuberculosis. Similarly would be the position of the defendant.

In short, our examination of the statutes and the jurisprudence convinces us that the action brought in this case could only be good if brought in time, to recover for the animals actually affected by tuberculosis. The defendant had a clear right to insist that the contract was good for the cattle that were sound. This brings us to another doubt. If part of the cattle was in good health and hence there was some consideration for the contract, it might be maintained that the contract existed and that the plaintiffs were only entitled to sue for a partial failure of consideration.

Let us suppose the payment of price for certain lands. It turns out that the vendor did not have title to one of the pieces. We think it is evident that the whole contract frequently, if not ordinarily, could not be rescinded or annulled.

Before concluding this opinion we desire to say, and this appears possibly from our general considerations, that [fol. 45] the plaintiffs never had the right to the cancellation of the whole contract, but only to bring a redhibitory action for the animals that were suffering from or died of a contagious disease.

Principally because the cause of action prescribed, and perhaps for other reasons, the judgment should be reversed and the complaint dismissed.

Adolph G. Wolf, Associate Justice.

In Supreme Court of Puerto Rico

[Title omitted]

Judgment—April 6, 1934

For the reasons stated in the foregoing opinion, the judgment appealed from rendered by the District Court of San Juan in the above-entitled case on January 12, 1931, is hereby reversed and the complaint dismissed.

It was so decreed and ordered by the court as witness the signature of the Chief Justice.

Emilio del Toro, Chief Justice.

Attest: Joaquin Lopez, Secretary-Reporter.

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[Memorandum. Petition for appeal; order allowing appeal; bond on appeal in the sum of $300 and supersedeas bond in the sum of $7,000, Leopoldo Diaz and Epifanio Fernandez Campos, sureties; orders of court approving bonds and citation are here omitted. A I. Charron, Clerk.]

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In Supreme Court of Puerto Rico

[Title omitted]

Assignment of Errors

And now, on this ninth day of July, A. D. 1934, came the above-named appellants, by their attorney, Martin Travieso, and say that the judgment made and entered by the Honorable Supreme Court of Puerto Rico in the above cause, on the sixth day of April, 1934, is erroneous for the following reasons:

1. The Supreme Court of Puerto Rico erred in not hold-
[fol. 46] ing, as a matter of law, that the contract between the plaintiffs, appellants and the defendant, appellee, for the purchase and sale of a herd of 122 head of cattle, shown to have been affected at the time of the sale with tuberculosis, a contagious disease, was null, void and nonexistent

and contrary to public policy, in accordance with the provisions of Article 1398 of the Civil Code of Puerto Rico.

2. The said court committed error when it held that the action brought by the plaintiffs, appellants against the defendant, appellee was an action for the rescission of a valid contract for the purchase of cattle, and it further erred when it held that said action was based upon the discovery by the purchaser of secret vices or defects in the animals purchased.

3. The said court committed error when it held that the plaintiffs, appellants had no right to demand that the whole contract of March 1, 1929, be declared to be null, void and non-existent and contrary to public policy, for the reason that the herd of cattle bought from defendant, appellee was affected with tuberculosis, and could not be made the object of a legal sale; and, further, the said court committed error when it held that the only remedy open to plaintiffs, appellants was to demand the rescission of the sale as to specific heads of said herd of cattle which had been found affected with tuberculosis.

4. The said court committed error in holding that tuberculosis, which is a contagious disease, should be considered as a hidden or secret vice or defect in the animals sold, and in holding, as a natural consequence of the aforesaid error, that plaintiffs, appellants' action for the rescission of the contract of sale should have been brought within the period of 40 days counted from the date of the delivery of the cattle to the purchaser, as provided by Article 1399 of the Civil Code of Puerto Rico. (Comp. of 1911, Section 4505.)

5. The said court committed error in not holding that plaintiffs, appellants, as purchasers of an entire herd of 122 head of cattle, had a right to reject and repudiate the whole sale, as an entirety and as null and void, upon discovery that a large number of the head of cattle composing the said herd were affected with tuberculosis, a contagious disease.

6. The court committed error in reversing the judgment [fol. 47] of the trial court in favor of the plaintiffs, appellants and in dismissing the complaint upon the erroneous ground that the right of action of said plaintiffs, appellants

was barred by the lapse of the 40 day period provided by said Article 1399 of the Civil Code of Puerto Rico.

7. The court erred in not holding that the action herein had been interposed by plaintiffs, appellants within the period of limitation provided for such action by the laws of Puerto Rico and by the principles of equity and justice.

8. The judgment of the Supreme Court of Puerto Rico is erroneous and contrary to law and equity and not justified by the undisputed facts and circumstances of the case.

Wherefore the appellants pray that the judgment of the Supreme Court of Puerto Rico be reversed and that final judgment be rendered by the Honorable United States Circuit Court of Appeals in accordance with the terms of the judgment rendered by the trial court in favor of the plaintiffs, appellants.

San Juan, Puerto Rico, July 9, 1934.

Martin Travieso, Attorney for Appellants.

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Translator's certificate omitted in printing.

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[fol. 48] IN SUPREME COURT OF PUERTO RICO

[Title omitted]

SECRETARY-REPORTER'S CERTIFICATE

I, Joaquin Lopez, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is the transcript of record prepared by the plaintiffs and appellants, which transcript I attach to this certificate as the record in the above-entitled case, at the request of the parties herein, as appears from the following stipulation concerning the record on appeal filed by the attorneys for plaintiffs, appellants and for defendant, appellee in the case at bar on April 2, 1935:

"Stipulation. It is hereby stipulated and agreed by and between the undersigned, attorneys for the appellants and appellee, respectively, that the foregoing is a true and exact

copy and translation into the English language of the original documents constituting the record of the above-entitled case in the Supreme Court of Puerto Rico; and that the same is hereby accepted and approved by both parties as the Record on Appeal to be submitted to the Circuit Court of Appeals for the First Circuit.

San Juan, Puerto Rico, April 2, 1935.

Martin Travieso, Attorney for Defendants-Appellants. Heriberto Torres Sola, Attorney for Plaintiff-Appellee."

In witness whereof I sign these presents in the City of San Juan, Puerto Rico, after having duly cancelled the sum of one dollar ($1.00) in Internal Revenue stamps, this fourth day of April, A. D. 1935.

Joaquin Lopez, Secretary-Reporter of the Supreme Court of Puerto Rico. (Seal.)

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[MEMORANDUM. Orders of enlargement of time for docketing case to and including April 16, 1935, are here omitted. A. I. Charron, Clerk.]

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[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1934

No. 3029

ALONSO HERMANOS et al., Plaintiffs, Appellants,

v.

JOSE MATOS, Defendant, Appellee

STATEMENT OF ERRORS, ETC.—Filed April 18, 1935

To Arthur I. Charron, Esq., Clerk of the above Court:

Now come the above-named appellants, by their undersigned attorney, and in accordance with the provisions of Rule 23, paragraph 8, of the Rules of this Honorable Court, respectfully submit herewith the following statement of the errors on which the appellants intend to rely and also

a statement of the parts of the transcript of record which the appellants think necessary for the consideration of the said errors:

Errors on Which Appellants Will Rely

The appellants will rely upon the first seven errors appearing in the "Assignment of Errors" filed by them with their petition for appeal, on July 9, 1934.

Parts of the Transcript of Record Necessary for Consideration of Errors Assigned

1. Verified complaint.
2. Motion to strike out.
3. Demurrers.
4. Order of February 3, 1930.
5. Verified answer to complaint.

[fol. 50] 6. Ocular view of premises.

7. Statement of facts, opinion and judgment of District Court.
8. Opinion of the Supreme Court.
9. Judgment of the Supreme Court.
10. Assignment of errors.
11. Translator's certificate.
12. Clerk's certificate.

Wherefore, appellants respectfully pray that only the aforesaid parts of the transcript of record be printed.

New York, April 17, 1935.

Martin Travieso, Attorney for Appellants, San Juan, Puerto Rico.

New York Address: c/o Arthur F. Gotthold, Esq., 53 William Street, New York City.

Certificate of Service.

I hereby certify that on this seventeenth day of April, 1935, I served a copy of the foregoing paper on Heriberto Torres Sola, Esq., attorney for the appellee in this case, by depositing the said copy in a sealed envelope addressed to the said attorney to his address "Edificio Bouret, San

Juan, Puerto Rico". Said sealed envelope was sent to said attorney, postage prepaid, by airmail.

New York, April 17, 1935.

Martin Travieso, Attorney for Appellants.

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In United States Circuit Court of Appeals

[Title omitted]

Counter Statement—Filed April 24, 1935

Now comes the above-named appellee by his undersigned attorney, and respectfully represents as follows:

1. That the appellants in this case have filed with the clerk of this Honorable Court a motion dated April 17, 1935, praying that only certain part of the record in the above-entitled case, to wit the following documents:

[fol. 51] 1. Verified complaint,
2. Motion to strike out,
3. Demurrers,
4. Order of February 3, 1930,
5. Verified answer to complaint,
6. Ocular view of premises,
7. Statement of facts, opinion and judgment of District Court,
8. Opinion of the Supreme Court,
9. Judgment of the Supreme Court.
10. Assignment of errors,
11. Translator's certificate,
12. Clerk's certificate,

be printed.

2. That there has been no stipulation between the parties herein providing for the printing of only a part of the record in accordance with the subdivision of Rule 23 of this aforesaid Honorable Court.

3. That in order that this Honorable Court may be placed in the same position in which the Supreme Court of Puerto Rico was when deciding this case and in order that in his brief this appellee can make proper references to the part

of the record upon which he will make arguments in support of an affirmation of the judgment, appellee from this case, it is necessary that the extra record certified as basis for this appeal be printed.

4. That the appellants in this case have filed an assignment of errors specifying eight errors, and although it is stated in the aforesaid motion that appellant will rely only upon the first seven errors thus specified, this appellee considers that for the proper consideration of said seven errors on which the appellants intend to rely, it is necessary that the record be printed in full, especially as the appellants have asked for the inclusion among the documents by them designated for printing, as expressed, one entitled "Ocular View of Premises", number 6 on the aforesaid list, which is a part of the evidence and which if considered by itself, and disconnected from the rest of the evidence introduced at the trial, would tend to affect prejudicially the rights of appellee, who would then have no opportunity for arguing on the evidence thus eliminated from the record.

[fol. 52] Wherefore, the appellee respectfully prays that the aforesaid motion of the appellants be denied, and that said appellants be ordered to print the entire record in accordance with the rules of this Honorable Court.

San Juan, Puerto Rico, April 22, A. D. 1935.

Heriberto Torres Sola, Attorney for Appellee, San Juan, P. R., Address: Bouret Building, Box 905, San Juan, P. R.

Certificate of Service

I hereby certify that on this twenty-second day of April, 1935, I served a copy of the foregoing paper on Martin Travieso, Esq., attorney for the appellants in this case, by depositing the said copy in a sealed envelope addressed to the said attorney, to his address in New York, c/o Arthur F. Gotthold, Esq., 52 William Street, New York City, N. Y. Said sealed envelope was sent to the said attorney, postage prepaid, by airmail.

San Juan, Puerto Rico, April 22, 1935.

Heriberto Torres Sola, Attorney for Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AS TO PRINTING RECORD—April 24, 1935

It is ordered that the clerk print only such portions of the transcript of record as are designated in appellants' statement of the parts of the record to be printed.

By the Court.

Arthur I. Charron, Clerk.

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[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1935

No. 3029

ALONSO HERMANOS et al., Plaintiffs, Appellants,

v.

JOSE MATOS, Defendant, Appellee

Appeal from the Supreme Court of Puerto Rico

Before, Bingham, Morton and Morris, JJ.

OPINION OF THE COURT—February 12, 1936

MORTON, J.:

This is an appeal by the plaintiffs from a judgment of the Supreme Court of Puerto Rico dismissing their complaint. The facts are not now in dispute, the findings of the court of first instance, the District Court of San Juan, having been confirmed by the Supreme Court. The principal question is whether the plaintiffs' suit is barred by the short statute of limitations applying to redhibitory actions.

The plaintiffs contracted to buy from the defendant a herd of one hundred twenty-two dairy cattle for $18,000; the cattle were delivered, and the full agreed consideration was paid for them in cash and property. Within a short time it developed that many of the cattle were infected with tuberculosis, a contagious disease. Seventy-two of them died or had to be killed for that reason. The exact number infected at the time of delivery is not stated. In the

[fol. 54] opinion of the Supreme Court it is said, "from the evidence, that court (the District Court) had the right to find that a great number of the cows sold were affected by tuberculosis at the time of the sale." The plaintiffs tendered back the sound cattle and demanded the return of the entire consideration which had been paid for the herd. The tender and the demand having been refused by the defendant, the present suit was instituted.

The District Judge held that there had been a failure of consideration on the part of the defendant; that the plaintiffs were entitled to recover back the entire consideration which had been paid by them; and that the defendant should take back the remaining cattle. On the defendant's appeal this judgment was reversed by the Supreme Court of Puerto Rico which held that the plaintiffs' action did not rest on failure of consideration, but was redhibitory in character and was therefore subject to the forty day statute of limitation above referred to. As the action had not been brought within this period, judgment was given for the defendant, from which the present appeal was taken.

The provision of the Puerto Rico Code which in the opinion of the Supreme Court barred the plaintiff's action reads as follows:

"Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs."

This section relates only to redhibitory actions, and the principal point of controversy is whether the plaintiffs' action is of that character.

Redhibitory actions, as defined in the Supreme Court opinion, are those in which the vendee alleging a breach by the vendor of an express or implied warranty in a sale seeks to return the thing sold or part of the thing sold and to recover back all or a part of the price paid. See too Childs v. Wilson, 15 La. Ann. 512; Henderson v. Leona Rice Milling Co., 160 La. 597; s. c. 107 So. 459; and Enciclopedia [fol. 55] Juridica Espanola, Vol. XXVI, page 884, referred

to in the opinion of the Supreme Court. There appears to be no question but what a valid sale sufficient to support a warranty by the vendor is an essential foundation of an action of redhibition. In the present case the District Judge held that under section 1397 tuberculous cattle could not be the subject of a contract of sale, that there had been no sale of the infected cattle, that as to them the plaintiffs' action was not redhibitory, and that the plaintiffs were not obliged to accept the sound cattle delivered with the diseased ones, but might reject the whole delivery and recover the entire consideration. For cases resting on failure of consideration a different and much longer statute of limitations applies. The Supreme Court held that there had been a valid sale of the diseased cattle which the plaintiffs were seeking to rescind and that the action was redhibitory.

The question depends on the true construction of section 1397 which reads as follows:

"Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

The Supreme Court, following the commentator Scaevola, held that this section did not *not* make contracts for the sale of tuberculous cattle void, but only voidable, subject to rescission at the option of the vendee; that if the vendee elected to rescind he must return to the vendor the tuberculous cattle; that the action was accordingly redhibitory and was barred by section 1399, supra.

This construction does great violence to the language used. It completely ignores the first sentence of the section, viz., that "animals and cattle suffering from contagious diseases shall not be the object of a contract of sale," and it reads "void" as "voidable." Other sections of the Code deal with the same subject matter, i. e., cattle [fol. 56] infected with contagious diseases, and must be considered in this connection.

"Section 351. Any person who shall knowingly sell, or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed any horse, mule, or other animal having the disease known as

glanders, or any other contagious or infectious disease, shall be guilty of a misdemeanor. (Rev. Stat. 5803.)

"Section 352. Every animal having glanders or any other contagious or infectious disease shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor." (Rev. Stat. 5804.)

"Section 356. Every person who owns or has the custody of any cattle, horses, mules or asses infected with a contagious disease, and fails to immediately report the same to the insular health authorities, or conceals the existence of such disease, or attempts so to do, or wilfully obstructs or resists the said health authorities in the discharge of his (their) duty as provided by law, or sells, gives away or uses the meat or milk, or removes the skin or any part of such animal, is punishable by fine not exceeding three hundred dollars or imprisonment in jail not exceeding one year, or both, in the discretion of the court."

"(Law of March 14, 1907.) Every person who knowingly sells or disposes of to another person any animal infected with or laboring under any infectious or contagious disease, or the meat, skin, hide, horns, hoofs, or any other part of an animal infected with or laboring under any infectious or contagious disease at the time of its death, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred dollars and not more than one thousand dollars or imprisonment in jail for not less than one month, nor more than one year, or to both such fine and imprisonment." (Rev. Stat. 118.)

These sections, in connection with others which it is unnecessary to quote, taken together, form a plan for dealing with the menace to public health occasioned by diseased animals. Section 1397 is obviously an integral part of this plan and should be so considered. The Supreme Court of [fol. 57] Puerto Rico does not seem to have had this aspect of the matter in mind. It is not referred to in the opinion, nor are the sections just quoted referred to. It is said by the court that the purchaser of a cow upon discovering that she has incipient tuberculosis has an election whether to keep her or to return her to the vendor. "To recover the

price, he must return the animal. It is entirely at his election to retain the cow." These views cannot be reconciled with the provisions of the sections above quoted which make criminal the sale or use of infected cattle knowing them to be so, and require the custodian of cattle found to be infected to kill them at once. It is contended by the appellants that the great weight of opinion by the commentators on the Spanish and other codes which contain sections substantially like 1397 is adverse to Scaevola's view on this point, and to the view taken by the Supreme Court of Puerto Rico. We do not think it necessary to consider this aspect of the matter; nor indeed upon such a question should we set our judgment against that of the Supreme Court of Puerto Rico. We recognize that the question before us is one on which the opinion of that court carries great weight and ought not to be set aside unless demonstrably erroneous; and we bear in mind the caution which must be exercised in dealing with such matters. Fernandez v. Ayllon y Ojeda, 266 U. S. 144, 146. But we see no escape from the conclusion that the Supreme Court of Puerto Rico overlooked important provisions of law and erred in disregarding the plain language of section 1397. There is no suggestion that the language of the section is ambiguous, but only that it is ill-advised and mistaken. In Helvering v. City Bank Farmers Trust Co., United States Supreme Court, November 11, 1935, it was said, "We are not at liberty to construe language so plain as to need no construction." We do not understand that the Supreme Court of Puerto Rico has greater powers. See too Thompson v. United States, 246 U. S. 547, 551.

We think it clear that cattle having contagious diseases are, in Puerto Rico, out of the commerce of man and cannot be made the object of a contract of sale. In attempted sales of such cattle no contract arises because there is [fol. 58] no "definite object which may be the subject of the contract" as required by section 1228. There being no contract there is nothing to rescind and, no property being in the vendee's possession that can lawfully be returned, there is nothing to return. There being no contract of sale on which a warranty, express or statutory, could rest, an action to recover back the price would not be redhibitory, and the prescription period of forty days or of six months (Sec. 1393) would not apply. Furthermore,

under the law of Puerto Rico when a contract lacks any one of the essentials prescribed in section 1228, no contract exists; and no declaration of nullity is necessary before an action may be brought to recover the price. See Valiente & Co. v. Succession of Abdon Fuentes Marrero, 76 Fed. (2d), 78 (C. C. A. 1). The deliveries of tuberculous cattle by the defendant to the plaintiffs amounted to nothing at all; and the payments made for them by the vendee in money and property were entirely without consideration. The action to recover such payments is not a redhibitory action and is not limited by the forty day provision of section 1399 or by the six months provision of section 1393.

If the herd of cattle which were sold be regarded as a unit and as the thing which was sold, a different result would be reached because about fifty of the cattle were sound and were legítimate objects of sale. The thing sold was not therefore completely unlawful as an object of commerce; the good portion of it would pass to the vendee and would have to be returned by him if he elected to rescind; the action would be redhibitory in character and would be limited by the provisions of section 1399. The Supreme Court of Puerto Rico did not however so regard the transaction. It said, "We have the idea that when cattle are sold, even for a dairy, the animals are sold individually. It is a distributive sale. It makes no difference that the sale was for a lump sum. With the exceptions noted in the chapter, only the cattle affected with a redhibitory vice",—the Supreme Court regarded tuberculosis as being of that character,—"under all the codes and the commentators that we have seen, may be returned." * * * "*The defendant had a clear right to insist that the contract was good for the cattle that were sound.* * * * Before [fol. 59] concluding this opinion we desire to say, and this appears possibly from our general considerations, that *the plaintiffs never had the right to the cancellation of the whole contract, but only to bring a redhibitory action for the animals that were suffering from or died of a contagious disease.*" (Italics supplied.)

There are great difficulties in dealing with the sale of a herd of cattle for dairy purposes as a unitary thing on questions of this character. The views of the Supreme Court of Puerto Rico on this point certainly cannot be said to be clearly wrong.

To summarize: In the trial court the plaintiffs put their claim on the herd basis; they endeavored to rescind the entire transaction and get back the full consideration which had been paid; and they were held entitled to do so. On appeal the Supreme Court held that the sale could not be given this unitary character, but must be considered with respect to the individual animals,—and that view stands. In its decision that, as to the tuberculous cattle, a contract was entered into and the plaintiffs' rights were of redhibitory character and subject to the limitation of section 1399, the Supreme Court fell into error.

It follows that the judgment appealed from must be reversed and the cause remanded to the District Court of San Juan with instructions to permit the plaintiffs to amend if they are so advised. As we understand the opinion of the Supreme Court this is the result which would have been reached in that court if section 1397 had been given what we hold to be the necessary construction of it. At any rate it is the just result.

The judgment of the Supreme Court of Puerto Rico is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellants recover costs of appeal.

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[fol. 60] In United States Circuit Court of Appeals

Dissenting Opinion

Bingham, J. (dissenting):

This is an appeal from a judgment of the Supreme Court of Puerto Rico of April 6, 1934, reversing a judgment of the District Court of San Juan of January 12, 1931, and dismissing the complaint.

The complaint was filed in the District Court of San Juan December 12, 1929. It was brought by Jose Roman Alonso and Manuel Alonso Monoz, sole members of Alonso Hermanos, a civil agricultural partnership, against Jose Matos, in which it was alleged that on March 1, 1929, the plaintiffs entered into a contract in which the defendant was to sell 122 head of cattle, of different genders, to the plaintiffs for the lump sum of $18,000; that the plaintiffs took possession of the cattle, agreeing to pay therefor as follows:

$3,000 in cash on the date of the contract; $5,000 by the transfer of an urban piece of property; and the balance of $10,000 to be paid within two years, expiring March 1, 1931, with interest at 9 per cent per annum, payable monthly, and to secure the $10,000 by a mortgage of property owned by Jose and Manuel; that on the date of the sale the cattle were apparently in good condition; that no notice to the contrary was given by the defendant to the plaintiffs, who had no knowledge of or experience in veterinary matters and were unable to discover at sight whether the cattle were suffering from any hidden disease; that long prior to March 1, 1929, the cattle thus sold were suffering from tuberculosis, a contagious disease; and that from March 18 to December 6, 1929, 43 of the cattle died of the disease (specifying the date of the death of each one and its color or marks); that, after a tuberculine test was made of the cattle, it was found that 29 more were affected with tuberculosis, contracted prior to the sale; and that the plaintiffs stand ready and willing to return to the defendant (and offer so to do) all the surviving cattle.

The prayer was that the court enter judgment declaring null and void, in accordance with Section 1397 of the Revised Civil Code, the contract for the sale of the cattle of March 1, 1929, and the mortgage securing the balance of $10,000; that the entries of the mortgage deed in the Reg- [fol. 61] istry of Property of San Juan be cancelled; that the plaintiffs recover of the defendant the sum of $8,000 paid for the cattle; and that the defendant pay costs and disbursements, etc.

In his answer the defendant admitted the making of the contract; that the plaintiff paid the first installment of $3,000 in cash and the second installment of $5,000 with the urban property transferred to him; and admitted that the plaintiffs agreed to pay the remaining $10,000 within two years with interest, which obligation was secured by the mortgage as alleged; but denied each and every other allegation of the complaint. He alleged as new matter that the cattle, on the date of the sale, were without vice or disease, occult or apparent, and were sold by him acting in good faith; that subsequent to the sale some of the cattle became affected with tuberculosis due to the fault of the plaintiffs in not properly feeding and housing them; and, as a special defense, among others, alleged that, if the plaintiffs had a

cause of action, it had prescribed, inasmuch as it was brought after the expiration of forty days from the delivery of the cattle, under Section 1399 of the Revised Civil Code.

In the District Court it was found that the cattle were to be used for dairy purposes; that 43 died and 29 were killed by the sanitary authorities due to their having tuberculosis; that the cattle died of a contagious disease; that those that were killed were first treated with the tuberculine test and the result was positive reaction; that the place to which the cattle were taken was in fair hygienic condition and had sufficient water; that the autopsy practiced on some of the cows showed that a chronic cavernous condition existed which indicated that the cattle had been sick for a number of months; and that, at the time of the sale, part of the cattle was suffering from a contagious disease.

The District Court was of the opinion that, inasmuch as some of the cows were suffering from a contagious disease at the time of the sale, the object of the contract as a whole was wanting and the contract was null and inexistent; that the action set out in the complaint was not a redhibitory one; that it had not prescribed under Section 1399 of the [fol. 62] Civil Code; that that section was not absolutely mandatory; that, being of the opinion that the contract "never had any existence because it lacked one of the essential elements for its validity, the term to allege its nullity * * * [was] not limited by any period of prescription"; and that the injured party was only required to claim the inexistence of the contract with reasonable diligence.

In the Supreme Court of Puerto Rico that court, after reviewing the evidence, reached the conclusion that the District Court "had a right to find that a great number of cows sold were affected by tuberculosis at the time of the sale"; that "the preponderance of the evidence satisfies us that the disease was not contracted after the sale, at least with respect to a number of the cows"; that the disease "existing, as it did in some cases in an advanced form the court had the right to decide the facts as it did."

It said that the plaintiffs' contention was that the action was based exclusively upon the idea that the sale was completely null and void and inexistent because a great part of the cattle was affected by tuberculosis at the time of the

sale, and came within the provisions of Section 1397 of the Civil Code, which reads:

"Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

After stating that tuberculosis was a contagious disease within the meaning of Section 1397, the court in considering that section stated that its provisions were the same as those of Section 1494 of the Spanish Civil Code of 1889; that the Spanish Code of 1889 was extended that year to Puerto Rico and was adopted in 1902 as its Civil Code; that the history of legislation in regard to vices of a thing sold for which a vendor gave a warranty shows that the vices in animals giving rise to a cause of action were characterized as redhibitory; that this was true from the time of the Ediles at Rome; that the "Latin word redhibitio means a return of the thing sold, or sometimes of part of [fol. 63] the thing sold, with a right to obtain all or a part of the price paid"; that "a vice in an animal causing the annulment or rescission of a sale has always been considered as redhibitory, at least up to the enactment of the Civil Code of Spain of 1889," in which year Sections 1397 and 1399 were added; that the plaintiffs' learned counsel "realized that in order to have a possibility of success in their suit they were bound to return or offer to return the animals, the subject of the contract, *whether diseased or not,*" and for this reason offered to return the cows that remained in their possession; that the action stated in the complaint was necessarily a redhibitory action, "whatever else it may be characterized or whatever else may be the effect of Section 1397"; also that the "action is a redhibitory one, whether the thing attempted to be sold can or cannot be the subject of a contract by reason of Section 1397"; that the court had come to the same conclusion with Scaevola that "Homer slept" when the legislature of Spain enacted Section 1494 of the Spanish Code of 1889 (which is the same as Section 1397 of the Civil Code of Puerto Rico); that the word "void" means "voidable" and the ac-

tion is redhibitory; that in Section 1397 (Spanish 1494) the legislature "necessarily * * * meant to say that a contract could be rescinded or annulled as in other redhibitory actions, and that Section 1397 does not exclude the *transaction made in this case* from the field of *warranty.*" In other words, that there was an existing contract of sale to which the warranty could attach and having reached the conclusion, that the allegations of the plaintiffs' complaint disclosed that it was a redhibitory action because the facts found (that 72 of the cattle included in the contract had a contagious disease and the remaining 50 were sound) necessarily rendered it redhibitory, that there was an existing contract of sale because the 50 sound cows would constitute the object of a contract, and that a rescission of it was necessary and required a return of the 50 sound cows to the vendor, the court proceeded to consider what it deemed the principal question in the case—whether the provision of 40 days within which to bring the action provided for in Section 1399 of the Civil Code of Puerto Rico and [fol. 64] Article 1496 of the Civil Code of Spain applied, and held that it did. And, it appearing that the plaintiffs' action was not brought until December 12, 1929, some ten months after the making of the contract and the delivery of the cattle, it ordered the action dismissed.

After a careful consideration of the matter I am of the opinion that, as applied to the allegations of the complaint and the specific facts found in this case, the court did not err either in holding that the action was redhibitory or that the right to prosecute it was barred.

But I think there are statements in the opinion, not necessary to the decision in the case, that go too far, for the provisions of Section 1397 of the Civil Code of Puerto Rico (Article 1494 of the Spanish Code) are not necessarily restricted to a redhibitory action, even though that section is included among other sections of the Code, the preface of which is "Warranty against hidden defects of or burdens of the thing sold."

The Civil Code of Puerto Rico in Sections 1228 and 1238, which correspond to Articles 1261 and 1271 of the Spanish Civil Code, provide:

"Sec. 1228. There is *no contract* unless the following requisites exist:

1. The consent of the contracting parties.

2. A definite object which may be the subject of the contract.

3. The cause for the obligation which may be established."

"Sec. 1238.—All things, even future ones, *which are not out of the commerce of man*, may be objects of contracts."

Section 1397 of the Civil Code, as we have seen, provides that "animals and cattle suffering from contagious diseases shall *not be the object* of a contract of sale."

Section 351 of the Penal Code makes the sale, use or exposure of an animal having a contagious disease, if knowingly done, a crime; and Section 352 of that Code provides that every animal having such a disease "shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a mis- [fol. 65] demeanor." Similar provisions are found in Sections 118, 121 and 122 of the Revised Statutes of Puerto Rico (Sections 4, 7 and 8 of the Act of March 4, 1907).

There can be no doubt, therefore, that cattle having a contagious disease are in Puerto Rico out of the commerce of man and cannot be made the object of a contract of sale; that, where a single animal having a contagious disease, or where several animals all having a contagious disease, are attempted to be sold, no contract of sale arises or can exist, for in neither case is there a lawful object of a contract and the attempted contract, under the provisions of Section 1228, is non-existent. Being non-existent there is nothing to rescind and, no property being in the vendee's possession that can lawfully be returned, there is nothing to return; there being no contract of sale there is nothing out of which a warranty, express or statutory, can arise, or to which it can attach, and an action to recover the price paid would not be redhibitory and the prescription periods of 40 days or of 6 months would not apply. Furthermore, under the law of Puerto Rico, when a contract lacks any one of the essentials prescribed in Section 1228, so that no contract exists, no declaration of nullity is necessary before an action may be brought to recover the price.

In Valiente & Company v. Succession of Abdon Fuentes Marrero, 76 Fed. (2d) 78, this court said:

"It may be said, as heretofore pointed out, that under Section 1228 of the Civil Code of Puerto Rico no contract exists where consent of the contracting parties is wanting [or where the object of a contract is wanting]; that such a contract is non-existent and void, and a decree of nullity under Section 1268 is not required, for the reason that that section, when read in connection with Section 1267, is called into play only in the case of contracts *containing the requisites mentioned* in Section 1228. Gonzalez et al. v. Fumero et al., 38 P. R. R. 497, and cases there cited."

And the Supreme Court of Puerto Rico, in the above cited case of Gonzalez v. Fumero, in construing Section 1228 of their Civil Code, said:

"The phrase 'there is no contract' excludes from that [fol. 66] juridical qualification everything outside of the concurrence of the three requisites. If one of them is missing the contract is not born and does not become real."

It appears from what has been said that cases may arise where the facts are such that the express language of Section 1397 will be applicable and an action will lie for the price paid without a redhibitory action or a prior suit for a declaration of nullity.

On the facts in this case, there being an existing contract to which a warranty attached the plaintiffs had their election (Civil Code, Sec. 1389) to sue on the warranty and recover the damages they sustained by its breach, or to return the sound cattle and recover the price paid. If they sued on the warranty, they had to bring their action within six months from the day of the delivery of the cattle (Civil Code, Sec. 1393). If they sought to rescind the contract they had to bring their action within forty days (Civil Code, Sec. 1399). See Record, page 40. The plaintiffs did not bring their action for more than ten months after the delivery of the cattle.

My associates apparently think that, although there was an existing contract of sale to which a warranty attached and on which warranty an action must be brought, if at all, within six months after delivery of the things sold, the plaintiffs nevertheless have six years within which to sue for money had and received, as if there were 122 distinct

contracts of sale in each of which there was a fixed sum agreed upon and paid for each of the cows, diseased or sound, and that an action for money had and received can be maintained for the price of the diseased ones, although there was no distinct price agreed upon for each cow. It is perfectly apparent that an action for money had and received would not lie under the circumstances here disclosed and that it should not be held to lie in this case, for it would be substituting an action for money had and received for an action for damages, which the warranty provided for, and extending the period within which suit might be brought from six months to six years.

In any event it certainly cannot be said that, as applied [fol. 67] to the plaintiffs' declaration and the particular facts of this case, the Supreme Court of Puerto Rico was clearly wrong in holding that the plaintiffs' action was redhibitory and, under the provisions of the Code, should have been brought within forty days after the delivery of the cattle. Diaz v. Gonzalez, 261 U. S. 102.

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[fol. 68] RECITAL AS TO SUBSTITUTE BOND

On April 16, 1935, by stipulation a substitute supersedeas bond was filed and approved.

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RECITAL AS TO HEARING

Thereafter, to wit, on October 15 and 16, 1935, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit on February 12, 1936, the opinion of the court (page 53) and a dissenting opinion, Bingham, J., (page 60) were filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—February 12, 1936

This cause came on to be heard October 15 and 16, 1935, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, February 12, 1936, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellants recover costs of appeal.

By the Court.

Arthur I. Charron, Clerk.

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Thereafter, to wit, on March 28, 1936, within time duly extended by the court, the following Petition for Rehearing was filed by appellee:

IN UNITED STATES CIRCUIT COURT OF APPEALS

APPELLEE'S PETITION FOR REHEARING—Filed March 28, 1936

Jose Matos, appellee, respectfully petitions this Honorable Court for a rehearing in the above-entitled case, wherein this court reversed the decree of the Supreme Court of Puerto Rico and remanded the case with instructions to permit the plaintiffs to amend if they are so advised.

The grounds upon which a rehearing is requested are as follows:

1. That, in deciding and ruling that certain provisions of [fol. 69] the Penal Code of Puerto Rico must be taken into consideration in this case, in connection with section 1397 of the Civil Code of Puerto Rico, on which the plaintiffs have based their action herein, and in declaring in effect that the Supreme Court of Puerto Rico had not had in mind the said provisions nor referred to the same in its decision, this Honorable Court overlooked the fact that this question of the relevancy of those provisions was raised, for the

first time, by the appellants in their motion for reconsideration submitted before said Supreme Court, and that that court did consider such question and rejected appellants' contentions on this point, in an opinion denying said motion for reconsideration, which opinion was mentioned by the appellants in their petition for appeal and in their brief, submitted to this Honorable Court, and was made a part of the original or typewritten transcript of record but excluded by the appellants (over appellee's objection) from the printed record of appeal filed in this court.

2. That, in deciding and ruling that said section 1397 of the Civil Code of Puerto Rico, which formed the basis of plaintiffs' action in this case, must be construed in connection with the sections of the Penal Code of Puerto Rico and other special laws relating to the sale, disposal or use of infected cattle knowing them to be so, this court overlooked and failed to give effect to applicable rules of statutory construction under which the language of said section 1397 should be interpreted independently of such penal provisions and in the light of other germane provisions enacted in the same title and chapter of the Civil Code where that section appears, and, further, with reference to the antecedents or history of the civil legislation involved and the opinions of civil law commentators on such legislation.

3. That, in remanding the cause herein with instructions to permit the plaintiffs, appellants, to amend, this court overlooked the constant theory and position maintained by said plaintiffs, appellants, throughout the proceedings successively had in this case before the District Court of San Juan, the Supreme Court of Puerto Rico, and this Honorable Circuit Court of Appeals, which theory and position are in conflict with the right to amend granted to the said [fol. 70] plaintiffs enabling them, in effect, at this stage of the litigation herein, some six years after the same originated, to make an entirely different case and to revive a cause of action which they discarded by their own deliberate choice; all to the prejudice of appellee's rights, including the right to invoke the defense of res judicata at the proper time and, similarly, to oppose on proper grounds before the District Court of San Juan, the granting of what would be tantamount to a new trial.

4. That, in applying section 1397 of the Civil Code of Puerto Rico to this case as authorizing a recovery in regard to the diseased cattle on the theory of the inexistence of a contract as to such cattle, notwithstanding the established fact that a large number of the animals, sold as a herd and for a lump sum, were sound, this court overlooked and failed to give effect to applicable principles of the civil law, in accordance with which the said section 1397, even if its language is to be literally interpreted as prescribing the nullity or inexistence of particular contracts, must be held as inapplicable to cases where not all but only a portion of the animals sold are defective in the sense expressed in the enactment.

Heriberto Torres Sola, Attorney for Defendant, Appellee. Ralph Bosch, of Counsel, New York City.

I, Heriberto Torres Sola, attorney for appellee, hereby certify that I am of the opinion that there is probable ground for the above petition and that it is brought in good faith and is not intended for delay.

Heriberto Torres Sola, Attorney for Defendant, Appellee.

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[fol. 71] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—April 30, 1936

The petition for rehearing filed March 28, 1936, is hereby denied.

By the Court.

Arthur I. Charron, Clerk.

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Recital as to Order Staying Mandate

Thereafter, to wit, on May 18, 1936, mandate was stayed until further order of court.

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Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 40,767. U. S. Circuit Court of Appeals, First Circuit. Term No. 227. Jose Matos, Petitioner, vs. Alonso Hermanos, et al. Petition for a writ of certiorari and exhibit thereto. Filed July 24, 1936. Term No. 227, O. T., 1936.

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FILE COPY

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# Supreme Court of the United States

**October Term, 1936.**

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JOSE MATOS, PETITIONER,

*vs.*

ALONSO HERMANOS, *et al.*, RESPONDENTS.

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## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Jose Matos, respectfully shows:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment made and entered in said Circuit Court of Appeals on February 12, 1936 (Circuit Judge BINGHAM dissenting), by which a judgment of the Supreme Court of Puerto Rico dismissing the bill of complaint was reversed, as to which judgment the Circuit Court of Appeals entertained a motion for rehearing and denied the same on April 30, 1936 (Tr. p. 71).

By order of the Circuit Court of Appeals, the issuance of the mandate was stayed on May 18, 1936 to afford petitioner an opportunity to apply to this Court for a writ of certiorari (Tr. p. 71).

## I.

## Statement of the Matter Involved.

This matter involves the interpretation of certain provisions of the Civil Code of Puerto Rico, originally taken from the Civil Code of Spain, and their application to a sale of a herd of cattle of which a portion were found some time after delivery to be suffering from tuberculosis. The Circuit Court of Appeals by a majority vote reversed the judgment of the Supreme Court of Puerto Rico, reversing the interpretation given by the Supreme Court of Puerto Rico to such statutes of Spanish origin and their application to the facts in this case (Tr. p. 53). Circuit Judge BINGHAM dissented and voted for affirmance (Tr. p. 60).

On March 1, 1929 petitioner sold and delivered to respondents a herd of cattle consisting of 122 head "of different nature, race, gender, ages and color for the lump sum of $18,000" (Tr. p. 2).

On March 18th, three of the cattle died. Respondents brought this suit before the District Court for the Judicial District of San Juan, Puerto Rico on December 12, 1929 (Tr. p. 1). At the time of filing suit 43 of the cattle had died of tuberculosis and 29 more had been killed by the Department of Health. The remaining 50 animals were sound and not infected (Opinion Trial Court, Tr. p. 19, *et seq.*)

The Trial Court found that some of the herd had tuberculosis at the time of the sale but made no finding

as to the number then suffering from the disease. It is admitted that petitioner acted in good faith and sold the cattle without knowledge that they were diseased.

Upon these facts respondents contend that the entire contract of sale was void and inexistent under Section 1397 of the Revised Civil Code of Puerto Rico, which provides that "animals and cattle suffering from contagious diseases shall not be the object of a contract of sale." Respondents contend that because some of the animals were suffering from tuberculosis, there was a total lack of consideration, that there was no contract between the parties, and seek to recover the entire purchase price.

Petitioner contends that the provisions of Section 1397 give rise only to a redhibitory action, an action in the nature of equitable rescission, and that respondents' remedies were a suit for damages for breach of warranty, or a redhibitory action for a partial rescission of the contract. Petitioner maintains that the 50 sound cattle were sufficient consideration to support the contract, that a contract did exist to which a warranty could attach, and that such contract cannot be considered inexistent.

It is admitted that any action for damages for breach of warranty or for the redhibition (rescission) of the contract had prescribed prior to the bringing of the action. Both by demurrer and by answer, petitioner pleaded prescription.

The Trial Court held that the entire contract was without consideration and inexistent and that there being no contract, respondents were entitled to re-

cover the entire purchase price, but that respondents should return to petitioner the 50 sound animals (Tr. p. 19, *et seq.*)

Upon appeal, the Supreme Court held by a unanimous decision that a breach of Section 1397 of the Revised Civil Code gave rise only to a redhibitory action, an action to rescind the contract, and that such action was barred prior to the bringing of the suit. The Supreme Court held that the demurrer for prescription should have been sustained, reversed the judgment of the District Court, and ordered the complaint dismissed (Tr. p. 25, *et seq.*) The Supreme Court denied a motion for reconsideration.

Upon appeal, the Circuit Court of Appeals by a majority vote reversed the Supreme Court of Puerto Rico and ordered the case remanded with instructions to permit respondents to amend their complaint in the Trial Court in such a way as to seek recovery only of the price of the 72 cattle which had died. The majority opinion held that the contract of sale might be divided and considered as two separate contracts, one covering the sound cattle and one covering the diseased cattle, or into 122 separate contracts, each for one cow. They held that as to such contract or contracts covering only the diseased cattle, there was a total lack of consideration under Section 1397 and that an action would lie to recover the price upon the theory that the contract was inexistent (Tr. p. 53, *et seq.*).

Circuit Court Judge BINGHAM dissented and in a dissenting opinion (Tr. p. 60, *et seq.*) held that there was only one contract and that it could not be divided

up and treated as separate contracts. He held that there was sufficient consideration to support the contract, that the contract was existent, and that respondents' cause of action was either for damages for breach of warranty or a redhibitory action for rescission, both of which had prescribed.

## II.

## Reasons Relied Upon for the Allowance of the Writ.

Petitioner respectfully submits that the decision of the Circuit Court of Appeals should be reviewed and the writ of certiorari issued for the following reasons:

(a) Because the prevailing opinion of the Circuit Court of Appeals has reversed the decision of the Supreme Court of Puerto Rico upon matters relating wholly to the construction and application of local statutes of Spanish origin, which construction and application were not clearly wrong.

(b) Because the prevailing opinion of the Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions.

The decision that a sale of diseased animals is inexistent under Section 1397 of the Revised Civil Code, rather than that such defect constitutes a redhibitory vice, is in conflict with the decision of the Supreme Court of Puerto Rico and of the Spanish authorities

locally applicable, as is the decision that a contract for the sale of a herd of animals of different nature, race, gender, ages and color, for a lump sum, is divisible and may be made an inexistent contract in part and a valid contract in part.

(c) Because the prevailing opinion of the Circuit Court of Appeals has decided important questions of general law in a way probably untenable and in conflict with the weight of authority.

The decision that the contract may be divided into a valid existing contract and an inexistent contract, the decision that the respondents are entitled to amend their complaint to state a cause of action on implied contract when they had an adequate remedy upon the express contract, and the decision that the respondents are entitled to amend their complaint to state a new and entirely different cause of action from that stated in the original complaint after the statute has run against such new cause of action, are all decisions upon important questions of general law and such decisions are untenable and in conflict with the weight of authority.

WHEREFORE, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the First Circuit, to certify and send to this Court a full and complete transcript of the record herein to the end that the said case may be reviewed and determined by this Court as provided by law, and that the decision of the Circuit Court

of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

JOSE MATOS,
By GABRIEL I. LEWIS,
*His Attorney.*

OSCAR B. FRAZER,
*Of Counsel for Petitioner.*

We hereby certify that we have examined the foregoing petition; that in our opinion the petition is well founded and entitled to favorable consideration by the Court and that it is not filed for the purpose of delay.

GABRIEL I. LEWIS,
OSCAR B. FRAZER,
*Counsel for Petitioner.*

# Supreme Court of the United States

**October Term, 1936.**

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JOSE MATOS, PETITIONER,

*against*

ALONSO HERMANOS, *et al.*, RESPONDENTS.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Statement.

The facts are fully set forth in the petition for the writ of certiorari to which reference is hereby made.

### Opinions of the Courts Below.

The opinions of the Circuit Court of Appeals are reported as "Hermanos v. Matos" at 81 Fed. (2nd) 930. The majority opinion appears at page 53 and the dissenting opinion at page 60 of the transcript. The original opinion of the Supreme Court of Puerto Rico is printed at page 46 D. P. R. 470, and the opinion denying reconsideration at 46 D. P. R. 909 (Spanish edition). Neither opinion is as yet published in the English edition. The original opinion of the Supreme Court is printed at page 25 of the transcript. The

opinion denying reconsideration is not printed, the Circuit Court of Appeals having ordered that it be omitted (Tr. 52). The opinion of the Trial Court is not published but appears at page 19 of the transcript.

## Jurisdiction of this Court.

The judgment to be reviewed was rendered on February 12, 1936 (Tr. p. 68), while the Circuit Court of Appeals entertained a petition for re-hearing (Tr. 68) and denied the same on April 30, 1936 (Tr. 71). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (Chap. 229, 43 Statutes 936; Title 28 U. S. C. A. Section 347).

## Specification of Errors.

Petitioner respectfully submits that the Circuit Court of Appeals in reversing the judgment of the Supreme Court of Puerto Rico, has erred:

1. In failing to follow the rule established by this Honorable Court that in matters which relate entirely to the construction or application of local statutes, especially those of Spanish origin, the decisions of the Supreme Court of Puerto Rico will not be disturbed or set aside unless they are clearly wrong.

2. In reversing the decision of the Supreme Court of Puerto Rico that plaintiff's right of action was redhibitory and was barred by prescription.

3. In holding that the contract of sale herein was divisible into two or more contracts, and in so interpreting the decision of the Supreme Court of Puerto Rico.

4. In permitting the amendment of the complaint to state a cause of action upon an implied contract for money had and received, when respondents had a remedy upon the express contract for breach of warranty, which had prescribed prior to suit.

5. In permitting the amendment of the complaint to set up an entirely new and different cause of action from that alleged in the original complaint after such new cause of action had been barred by prescription.

## Summary of Argument.

1. Respondents' right of action was for rescission (redhibition), which had prescribed.

2. The contract is not divisible.

3. The Circuit Court of Appeals erred in permitting respondents to amend their complaint to state a cause of action on an implied contract;

(a) Because respondents had an adequate remedy on the express contract; and

(b) Because the amendment would state a new cause of action already barred.

4. The Court erred in reversing the Supreme Court on matters of Spanish law.

5. The result reached is not just.

## POINT I.

**Pulmonary tuberculosis in an animal constitutes a redhibitory vice, which is a breach of warranty and gives rise to an action for rescission of the contract, or at the vendee's option, an action for damages for breach of warranty, both of which actions had prescribed when this suit was brought.**

The complaint proceeds upon the theory, and respondents so contend, that the contract of sale was wholly inexistent,—that no contract at all was entered into between the parties,—that the contract was a nullity in toto, and that they are entitled to recover the entire purchase price of the 122 cattle because of the fact that a portion of the cattle were suffering from pulmonary tuberculosis at the time of the sale, and notwithstanding that upon the trial it was admitted and found that 50 head were sound and well. They base this contention upon the following section of the Revised Civil Code of Puerto Rico:

> "Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.
>
> A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

Respondents would disregard entirely the sections of the Code surrounding Section 1397 and consider this

section by itself, maintaining that because of this section this case is governed by the following sections of the Revised Civil Code.

> "Section 1228.—There is no contract unless the following requisites exist:
>
> 1.—The consent of the parties.
>
> 2.—A definite object which may be the subject of the contract.
>
> 3.—The cause (consideration) for the obligation which may be established.
>
> Section 1238.—All things, even future ones, which are not out of the commerce of man, may be objects of contracts."

Respondents maintain that since under Section 1397 cattle suffering from a contagious disease could not be the subject of a contract of sale, there was "no definite object which may be the subject of the contract" and likewise no "cause (consideration) for the obligation".

Petitioner contends, and the Supreme Court of Puerto Rico so held, that it is clear from the context of Section 1397 and its position in the Civil Code, the history of the section itself, and from the opinions of the Spanish commentators, that pulmonary tuberculosis in cattle, like any other hidden defect in an animal or thing sold, is a breach of warranty and gives rise to an action for damages for breach of warranty or an action to rescind the contract in whole or in part, as the case may be, for such breach of warranty. Petitioner contends, and the Supreme Court so held, that notwithstanding the breach of warranty there was an

existing contract between the parties which cannot be adjudged to be an inexistent contract under Section 1228, and that the true meaning of Section 1397 is that the contract is not void but voidable.

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this point, but far from being clearly wrong the decision of the Supreme Court is clearly right on principle and is supported by the overwhelming weight of authority.

Section 1397 is not placed in that chapter of the Civil Code which treats of "Nullity of Contracts" (Chapter VI of Title II of Book 4th), but in Title IV which treats of "Contracts of Purchase and Sale" in a subdivision entitled "Warranty against hidden defects of or burdens on the thing sold". This subdivision comprises 16 sections of the Code, all dealing with the warranty against hidden defects. For the convenience of the Court we are printing the entire subdivision as Appendix "A" to this brief.

Sections 1387 and 1388 make the vendor liable for hidden but not for patent defects; Section 1389 gives the vendee an option to withdraw from the contract or demand a proportional reduction of the price; Sections 1390 and 1391 refer to a loss of the thing sold; Section 1392 refers to warranties in judicial sales, and Section 1393 provides a six months' Statute of Limitations on actions based on the preceding sections. Section 1394 is peculiarly applicable to the present case. It provides:

> "Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the red-

> hibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.
>
> This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same."

Section 1395 makes the provisions of the preceding section applicable to things other than animals. Section 1396 provides:

> "Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, *except in the case prescribed in the following section.*" (Italics ours.)

Then follows Section 1397 (*supra*), upon which respondents rely. Section 1398 provides that if the hidden vice is such that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory, but if the veterinarian by negligence or bad faith fails to discover it, the veterinarian shall be liable. Section 1399 then provides the Statute of Limitations which the Supreme Court held to bar the present action, as follows:

> "Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established."

Section 1400 treats of the death of an animal within three days after delivery. Section 1401 requires the return of the animals sold if the sale be rescinded, and Section 1402 gives to the vendee of animals suffering with redhibitory vices, the option to withdraw from the contract or demand a proportional reduction in the price.

This whole chapter or subdivision was copied from the Spanish Civil Code of 1889, which was in force in Puerto Rico at the time of the change of sovereignty. We submit that clearly these sections were intended to constitute and do constitute a complete statute covering the matter of warranty against hidden defects and that all of its sections are parts of an integrated plan and must be read together. We submit, and the Supreme Court so held, that Section 1397 refers to a warranty against hidden defects just as much as do the other sections in the Chapter. The Legislature could never have intended to interpolate into this statute on warranties a section covering the inexistence of contracts which in itself would negative any idea of a warranty. If the contracts referred to in Section 1397 were inexistent, clearly there would be no warranty, as there would be no contract upon which to fasten the warranty, and yet this section appears as an integral part of this Statute covering warranties.

Upon the question of whether the contagious diseases referred to in Section 1397 constitute a redhibitory vice and a breach of warranty as maintained by petitioner, or whether they make the contract wholly inexistent and hence preclude the possibility of any

warranty, as contended by respondents and as held by the Circuit Court of Appeals, the concluding phrase of Section 1396 (italicized above) is peculiarly enlightening. This section provides that the warranties against hidden vices of animals shall not obtain in sales made at fairs, etc., "except in the case prescribed in the following section", and the following section is the disputed Section 1397 referring to contagious diseases. Unless the Legislature understood and intended that the contagious diseases referred to in Section 1397 were hidden vices, and a breach of warranty, the last clause of Section 1396 would be absolutely meaningless.

The history of this legislation shows conclusively that pulmonary tuberculosis in cattle was understood and intended by the Legislature to be a redhibitory vice and subject to the short Statute of Limitations contained in the present Section 1399 (*supra*). The Spanish Civil Code of 1889 (containing the sections in Appendix "A" but with different numbers) was taken largely from the Civil Code Bill or Project of 1851, which has been called the parent of the Code of 1889. Article 1460 of the Project of 1851 is practically the same as the first paragraph of Section 1397 of the present Revised Civil Code. It read:

> "The sale of cattle or other animals suffering from contagious diseases is prohibited, and any contract made with respect to the same shall be void."

This article appeared in the Project of 1851 in a chapter entitled "Warranty against hidden defects or encumbrances of the thing". The Project of 1851, how-

ever, went on to define what constituted redhibitory defects as follows:

> "1420. With respect to cattle, the following constitute redhibitory defects:
>
> 1. The condition resulting from the non-expulsion of the placenta and the reversion or fall of the uterus or vagina, provided that the parturition took place while the cow was in the possession of the vendor.
>
> 2. *Pulmonary tuberculosis.*
>
> 3. Epilepsy.
>
> 4. The vice of sucking cows (mamonas).
>
> 1421. In the case of subdivision one of the preceding article, the action must be brought within nine days. In the case of the other three subdivisions, within fifteen days."

The principle that a hidden vice in animals gives rise to a redhibitory action for a breach of warranty goes back in Roman law to the time of the Ediles (see Enciclopedia Juridica Espanola XXVI, 884, quoted at length in the Supreme Court opinion, Tr. p. 36) and appears today in the Codes of those countries following the Roman law. In Les Codes Francais, 12th Edition of Louis Tripier, 1861, p. 22, the author gives pulmonary tuberculosis as the first redhibitory defect in cattle. The Belgian Code contains similar provisions.

That pulmonary tuberculosis in cattle is a redhibitory vice, giving rise to an action for rescission, and that it does not cause the inexistence of the con-

tract is the overwhelming view of the Spanish commentators on Section 1494 of the Spanish Code which is identical with Section 1397 of the Puerto Rico Code. The opinion of the Supreme Court of Puerto Rico, at pages 31 to 37 of the transcript, contains quotations from many of these commentators which, for the sake of brevity, we are not repeating here but which leave no doubt upon the subject.

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this fundamental question of Spanish law largely through a mistaken application of certain sections of the Penal Code of Puerto Rico which are totally irrelevant. The majority opinion states (Tr. p. 55):

> "Other sections of the Code deal with the same subject matter, i. e., cattle infected with contagious diseases, and must be considered in this connection."

The Court then copies Sections 351, 352 and 356 of the Penal Code and a criminal statute of March 14, 1907, and continues:

> "These sections in connection with others which it is unnecessary to quote, taken together, form a plan of dealing with the menace to public health occasioned by diseased animals. Section 1397 is obviously an integral part of this plan and should be so considered. The Supreme Court of Puerto Rico does not seem to have had this aspect of the matter in mind. It is not referred to in the opinion, nor are the sections just quoted referred to. * * * But we see no escape from the conclusion that the Supreme

> Court of Puerto Rico overlooked important provisions of law and erred in disregarding the plain language of Section 1397."

The Circuit Court of Appeals states and apparently understood that the sections of the Penal Code which it quotes were a part of the Civil Code, with which, of course, the Penal Code has no relationship. The Civil Code, of which Section 1397 forms a part, is a Spanish statute founded upon Roman law, and the principles set forth in the chapter on warranties go back many centuries, while the Penal Code is a statute of American origin adopted in Puerto Rico for the first time after the American occupation and having no connection with any Spanish or Roman law. Obviously, the sections of the Penal Code copied in the opinion which were taken from the criminal law of one of the American States can have no connection with the provisions of the Civil Code of Spain as to warranties, which antedated the criminal statute by many years. To hold that these sections of the Penal Code and Section 1397 of the Civil Code are integral parts of a coordinated plan was clearly erroneous.

Nor did the Supreme Court of Puerto Rico overlook these sections of the Penal Code. In denying the respondents' motion for reconsideration, the Supreme Court said (translating from 46 D. P. R. 910):

> "The proponents of the motion now draw our attention to the provisions of the law making a vendor of diseased animals subject to a criminal prosecution. The answer to this suggestion is that the law only covers the sale of animals knowing them to be contaminated with

> a contagious disease. The Puerto Rican Legislature thought that such an act was criminal and so declared, but the fact that it is declared to be criminal does not necessarily affect the rights between parties, especially where there is no bad faith. The idea of the Spanish Legislature, and it is our own, was *Interest Reipublicae ut sit finis litium.*"

We submit that under the overwhelming weight of authority on this question of Spanish law, respondents' remedy was to sue under Section 1394 for a partial rescission of the contract and that such right of action had prescribed under Section 1399 and that the complaint was properly dismissed by the Supreme Court.

## POINT II.

**The Circuit Court of Appeals erred in holding that the contract could be divided and that as to the cattle suffering from tuberculosis, the contract was inexistent.**

Clearly the contract was not inexistent under Section 1228 (*supra*) for lack of a licit object or consideration. At most there was a partial lack or partial failure of consideration and the 50 cattle which were admittedly sound and well were sufficient consideration to support the contract.

The prevailing opinion of the Circuit Court of Appeals admits this and holds that if the contract be considered as a single contract, then the action must

fail and the judgment of the Supreme Court be affirmed. The Court says (Tr. p. 58):

> "If the herd of cattle which were sold be regarded as a unit and as the thing which was sold, a different result would be reached because about fifty of the cattle were sound and were legitimate objects of sale. The thing sold was not therefore completely unlawful as an object of commerce; the good portion of it would pass to the vendee and would have to be returned by him if he elected to rescind; the action would be redhibitory in character and would be limited by the provisions of section 1399."

The majority of the court then proceeded by an attempted legal fiction to create two contracts between the parties, one contract covering the sound cattle, which the Court held to be a valid and existing contract, and another and wholly different contract covering the diseased cattle, which the Court then proceeded to declare inexistent upon its theory that tuberculosis causes the inexistence of a contract and not the right to rescind. Having reached this conclusion, the Court remands the case with instructions to permit the plaintiffs to amend their complaint in the Trial Court in such a way as to make the action an action for money had and received based upon the inexistence of this fictitious contract for the sale of the diseased cattle.

In reaching this conclusion, the majority of the Court purported to follow a holding by the Supreme Court of Puerto Rico in its opinion, *but the Supreme Court never made any such holding* as a reading of its opinion will readily demonstrate.

The respondents had contended in the Trial Court and before the Supreme Court, and the Trial Court had held, that the entire contract was inexistent. Respondents maintained that they bought a herd of cattle and not 122 cows, that they bought one single thing and not 122 things; they maintained that the one thing which they bought (a herd of cattle) had tuberculosis and that therefore this one thing could not be the object of a sale under Section 1228 and that the contract was inexistent. They insisted that the Court had no right to inquire how many of the cows were diseased, that if a large part of the herd were diseased then the single thing which they bought was diseased. It was in disposing of this argument and for this purpose only that the Supreme Court used the expressions quoted in the majority opinion. The Supreme Court held that what the respondents bought was 122 cows, that some of them might be well and some of them sick, and that it did not follow that the entire herd was suffering from a contagious disease because some of the individual cattle were diseased.

The Supreme Court held that the respondents bought 122 individual cattle but they certainly never held, nor could they possibly have intended to hold, that the parties made 122 separate contracts, one covering each cow, which is the meaning attributed by the Circuit Court of Appeals to Judge WOLF's opinion.

Section 1394 of the Civil Code (see Appendix A) expressly provides that where several animals are sold for a lump sum, the contract may be rescinded as to those animals suffering from a defect *but not as to the*

*other animals.* The Code thus expressly provides for the partial rescission of a contract covering more than one animal and provides that in determining whether the animals sold were defective each animal must be considered separately. This is unquestionably what the Supreme Court had in mind as this is the result which that Court reached (see portion of Supreme Court's opinion italicized by the Circuit Court of Appeals in its opinion on page 59 of the transcript). This is not a decision that there was more than one contract, or that there was a separate contract covering each animal, as the Circuit Court of Appeals held, but a decision that the one single and only contract actually made may be partially rescinded.

The theory adopted by the Circuit Court of Appeals is not only contrary to the authorities but it is untenable as a matter of logic. One single contract may well be rescinded in part and stand in part but it cannot be both existent and inexistent at the same time any more than a man may be alive and dead at the same time. Here the parties either made a contract or they did not make a contract. They certainly never made two contracts or 122 contracts. If there was a licit object and a consideration for the contract the parties actually made, then that contract constituted a contract under Section 1228 (*supra*). The Circuit Court of Appeals found there was a licit object and consideration and that there was a contract. To hold that that contract may be so divided up that part of it is a contract and another part of it is not a contract is to read into Section 1228 a provision that a contract may be partially inexistent where there is a partial

lack of consideration. There is no such principle in the Spanish law, nor, so far as we know, in any English common law jurisdiction. Where a contract is divisible by its nature, suit may be brought to cancel it in part or to rescind it in part, but such a suit in itself recognizes the existence of the contract, while the theory followed by the Circuit Court of Appeals is that the contract is in existence and at the same time that it never was in existence.

Upon this point we would quote the sound reasoning of the dissenting opinion of Mr. Justice BINGHAM, who says (Tr. p. 66):

> "My associates apparently think that, although there was an existing contract of sale to which a warranty attached and on which warranty an action must be brought, if at all, within six months after delivery of the things sold, the plaintiffs nevertheless have six years within which to sue for money had and received, as if there were 122 distinct contracts of sale in each of which there was a fixed sum agreed upon and paid for each of the cows, diseased or sound, and that an action for money had and received can be maintained for the price of the diseased ones, although there was no distinct price agreed upon for each cow. It is perfectly apparent that an action for money had and received would not lie under the circumstances here disclosed and that it should not be held to lie in this case, for it would be substituting an action for money had and received for an action for damages, which the warranty provided for, and extending the period within which suit might be brought from six months to six years."

That a contract is not inexistent, or partially inexistent, because of a partial lack or failure of consideration is demonstrated by the following quotation from Manresa, one of the leading Spanish commentators:

> "There are three legal definitions of consideration: One for each group of contracts; onerous, remuneratory and gratuitous. Simple and clear as the legal text is, it has far reaching effects; it establishes a presumption that may provide a consideration for every contract and, in this sense, it supplements Article 1277, explaining generally and *a priori* the execution in principle of all licit contracts. Such presumption *renders very difficult the allegation of absence of consideration in contracts, such as contracts of sale or exchange,* which by imposing reciprocal obligations carry in themselves a sufficient consideration." (Italics ours.) Manresa's Commentaries, Vol. 8, page 678.

See also *Schluter* v. *Fernandez,* 30 P. R. R. 117, a suit for the purchase price of certain hams. While it appeared that some of the hams were rotten it also appeared that the purchaser had sold some of them which, therefore, had some value, and the Court allowed recovery of the entire contract price. Clearly if the contract were partially inexistent, or divisible, the Court could not have allowed recovery of the entire contract price.

At common law the rule, of course, is that any consideration is sufficient to support a contract and that a partial failure of consideration does not make the contract void or inexistent. (See 13 Corpus Juris 368 and cases there cited under note 2.)

We have found no case where a partial failure of consideration was held to make a contract void to the extent of such failure, nor any case holding that a single contract covering the sale of various different chattels for a lump sum could be divided up in such a way as to make void and inexistent part of the contract because of the partial failure of consideration. The practical impossibility of dividing the present contract is apparent from the allegation of the complaint that the 122 animals were sold for the lump sum of $18,000 and that they were "of different nature, race, gender, ages and color". The Court cannot remake the contract by supplying a price for each individual animal according to its "nature, race, gender and age" as the parties admittedly never contracted upon any such terms.

## POINT III.

**The Circuit Court of Appeals erred in granting to respondents permission to amend their complaint to state an action for money had and received covering the price of the diseased cattle:**

(A) BECAUSE RESPONDENTS HAD AN ADEQUATE REMEDY UPON THE EXPRESS CONTRACT.

The Circuit Court of Appeals found that there was a contract between the parties because the sound cattle were sufficient consideration to support a contract. That contract necessarily contained the warranties provided by Sections 1389 *et seq.* of the Code (see

appendix), which warranties were a part of the express contract between the parties. Under Sections 1389, 1394 and 1402 respondents could have recovered the price or value of the diseased animals in a suit upon the express contract, but such suit prescribed six months after delivery of the cattle (Sections 1393, 1402) and had prescribed four months before this suit was brought. The Circuit Court of Appeals would permit the respondents now to amend their complaint to set up this same cause of action under the guise of an action for money had and received, an action upon an implied contract. The action contemplated by the Code sections for breach of warranty, permitting the vendee to recover the price or value of the diseased cattle, and the action for money had and received proposed by the Circuit Court of Appeals are to all intents and purposes identical, and as aptly stated by Circuit Judge BINGHAM in his dissenting opinion (Tr. p. 66) the effect of permitting the amendment is to extend the period within which the suit might be brought from six months to six years.

> "Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject matter; which is certainly sound law, unless the express contract has been rescinded or abandoned." *Hawkins* v. *United States,* 96 U. S. 698.

The civil law does not differ from the common law in this respect.

(B) BECAUSE THE AMENDMENT WOULD STATE AN ENTIRELY NEW AND DIFFERENT CAUSE OF ACTION FROM THAT STATED IN THE ORIGINAL COMPLAINT AND AS TO SUCH PROPOSED NEW CAUSE OF ACTION THE STATUTE HAS RUN.

The proposed amendment would state an entirely new cause of action. The complaint filed alleged that there was never any contract at all between the parties. The proposed amendment would proceed upon the theory that there were actually two contracts between the parties, and that one of them covering the sale of the tubercular cattle was inexistent, or that there was actually one contract, a part of which was existent and another part of which was inexistent at the same time. In either event the amended complaint would be directly contrary to the original allegation that there was no contract at all.

The cattle were sold and delivered on March 1, 1929. The judgment permitting the amendment was entered February 12, 1936, or almost seven years later. Even though the respondents had an action based upon the nullity of the contract, or part of the contract, that action prescribed four years after March 1, 1929.

Section 1268 of the Revised Civil Code provides:

> "Sec. 1268. The action for nullity shall last four years.
>
> "This term shall commence to run:
>
> "In cases of * * * error or deceit or falsity of consideration, from the date of the consummation of the contract."

Section 140 of the Puerto Rico Code of Civil Procedure covering the amendment of pleadings is exactly the same as Section 473 of the California Code of Procedure, the Puerto Rico Code being taken from the Idaho Code which in turn came largely from the California Code. In conformity with the prevailing view in Code states the courts of California have repeatedly held that a complaint may not be amended to state a new or different cause of action;

> *Union Lumber Co.* v. *Shouter Co.,* 25 Cal. App. 80; 142 Pac. 910;
> *Altpeter* v. *Postal Tel. Cable Co.,* 26 Cal. App. 705; 148 Pac. 241;

especially where the Statute of Limitations had run against such new cause of action;

> *Peiser* v. *Griffin,* 125 Cal. 9;

and that if the amendment states a new cause of action the amendment does not relate back to the beginning of the action so as to stop the running of the statute.

> *Hunt* v. *Glassell,* 30 Cal. App. 676; 159 Pac. 227.

The situation in the present case is much like that disclosed by the opinion in *Warner* v. *Godfrey,* 186 U. S. 365, in which this Honorable Court reversed a judgment of the Court of Appeals of the District of Columbia which had permitted an amendment under similar circumstances.

## POINT IV.

**The decision of the Supreme Court of Puerto Rico upon matters relating wholly to the construction and application of local statutes, especially statutes of Spanish origin, will not be disturbed when such construction and application are not clearly wrong.**

*Diaz* v. *Gonzalez,* 261 U. S. 102.

## POINT V.

**The result reached by the Circuit Court of Appeals is not a just result.**

Perhaps the compelling reason in the minds of the majority of the court for the result they reached in this case is that set out in the final words of the opinion (Tr. p. 59):

"At any rate it is the just result"

and this expression would seem to indicate that the court itself entertained considerable doubt as to the soundness of its reasoning.

We submit that the result reached is not the just result unless we are to take the view that all Statutes of Limitation are in themselves unjust.

Respondents had their choice of two perfectly adequate remedies. They could have sued for rescission within forty days after delivery of the cattle or for damages for breach of warranty within six months.

Three of the cattle died eighteen days after delivery and six more within the next ten days, yet apparently the respondents made no effort to determine the cause of these deaths as the tuberculosis was discovered by accident by a veterinarian only in July (Tr. p. 20). Even on that date when respondents had definite knowledge of the presence of tuberculosis in the cattle, they still had ample time to sue for breach of warranty but they waited until December before bringing suit. It cannot be said that the statute worked any hardship on them. As the Supreme Court says, to permit the vendee to wait two or three or four years before filing suit would be unjust to the vendor, who in this case it is admitted acted in perfect good faith. The Trial Court did not presume to find how many of the cattle had tuberculosis when they were sold. Who can say that those cattle which died in November and December already had tuberculosis when delivered on March 1st? It may well be that prompt action by the respondents to determine the cause of the first deaths would have prevented the spread of the disease and saved many of the cattle which later died. The short statute is only a fair and reasonable protection to the vendor and the requirement of prompt action on the part of the vendee is not an undue hardship. Furthermore, as the Supreme Court aptly says:

> "The idea of the Spanish Legislature, and it is our own, was *Interest Republicae ut sit finis litium.*"

## CONCLUSION.

**It is respectfully submitted that these most important questions of Spanish law and of general law have been erroneously decided by the Circuit Court of Appeals and that the decision of the Circuit Court of Appeals should be reviewed by certiorari and reversed.**

Respectfully submitted,

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*His Attorney.*

OSCAR B. FRAZER,
*Of Counsel for Petitioner.*

## APPENDIX "A".

### Revised Civil Code of Puerto Rico.

Book Fourth,—Title IV,—Chapter IV,—
Article Third:—

§ 2.

*"Warranty against hidden defects of or burdens on the thing sold.*

Sec. 1387. The vendor is bound to give a warranty against hidden defects which the thing sold may have should they render it unfit for the use to which it was destined, or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and who by reason of his trade or profession should easily perceive them.

Sec. 1388. The vendor is liable to the vendee for the warranty against faults or hidden defects in the things sold, even when they should be unknown to him.

This provision shall not obtain if the contrary should have been stipulated and the vendor should not have been aware of said faults or hidden defects.

Sec. 1389. In the cases of the two preceding sections the vendee may choose between withdrawing from the contract, the expenses which he may have incurred being returned to him, or demanding a proportional

reduction of the price, according to the judgment of experts.

If the vendor knew of the faults or hidden defects in the thing sold and did not give notice thereof to the vendee, the latter shall have the same option, and furthermore, be indemnified for the losses and damages should he choose the rescission.

Sec. 1390. If the thing sold should be lost on account of hidden faults and the vendor was aware of them, he shall bear the loss, and return the price and pay the expenses of the contract, with losses and damages. If he was not aware thereof, he shall only return the price and pay the expenses of the contract which the vendee may have paid.

Sec. 1391. If the thing sold had any hidden fault at the time of the sale, and should be lost afterwards by a fortuitous event or by fault of the vendee, the latter may demand of the vendor the price he paid, deducting the value the thing had when lost.

If the vendor acted in bad faith, he must pay losses and damages to the vendee.

Sec. 1392. There shall be no liability for losses and damages in judicial sales, but all the other provisions of the preceding section shall be applied.

Sec. 1393. Actions arising from the provisions of the five preceding sections shall be extinguished after six months, counted from the delivery of the thing sold.

Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special

price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.

This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same.

Sec. 1395. The provisions of the preceding section, with regard to the sale of animals, is understood as applicable also to the sale of other things.

Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, except in the case prescribed in the following section.

Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.

Sec. 1398. If the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable for losses and damages.

Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

Sec. 1400. If the animal should die within three days after being bought the vendor shall be liable, provided the disease that caused the death, in the judgment of veterinarians, existed before the contract.

Sec. 1401. If the sale has been rescinded the animal must be returned in the condition in which it was sold and delivered, the vendee being liable for any injury due to his negligence and which does not arise from the redhibitory vice or defect.

Sec. 1402. In the sale of animals and cattle with redhibitory vices the vendee shall enjoy the privilege mentioned in Section 1389; but he must make use thereof within the same period which has been respectively fixed for the exercise of the redhibitory action."

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# Supreme Court of the United States
## October Term, 1936.

JOSE MATOS, PETITIONER,

*vs.*

ALONSO HERMANOS, *et al.*, RESPONDENTS.

## BRIEF FOR PETITIONER.

This is a proceeding to review by certiorari a decision of the United States Circuit Court of Appeals for the First Circuit which, by a divided Court, reversed a unanimous judgment of the Supreme Court of Puerto Rico. The writ of certiorari was granted by this Honorable Court on October 12, 1936.

### Opinions of the Courts Below.

In the Circuit Court of Appeals the majority opinion was rendered by Judge MORTON and the dissenting opinion by Judge BINGHAM. Both opinions are reported as "*Hermanos v. Matos*" at 81 Fed. (2nd) 930. The majority opinion appears at page 50 * and the dissenting opinion at page 56 of the Transcript. The

* NOTE.—All references in this brief to pages of the Transcript refer to the pages as numbered in the Transcript printed under direction of the Clerk of this Court, the paging of which differs from the paging of the certified copy of the record before the Circuit Court which was filed with the petition for certiorari.

decision of the Supreme Court of Puerto Rico was unanimous. It is printed in the Spanish edition of the Official Supreme Court Reports at 46 D. P. R. 470. The opinion of the Supreme Court of Puerto Rico denying reconsideration appears at 46 D. P. R. 909. Neither opinion is as yet published in the English edition of the reports but the original opinion of the Supreme Court appears in the Transcript at page 24. The opinion denying reconsideration does not appear in the Transcript but we are including it as Appendix B to this brief in English. The opinion of the Trial Court is not published but appears at page 17 of the Transcript.

## Jurisdiction of This Court.

The judgment to be reviewed was rendered on February 12, 1936 (Tr. p. 64), while the Circuit Court of Appeals entertained a petition for re-hearing (Tr. p. 64) and denied the same on April 30, 1936 (Tr. 66). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (Chap. 229, 43 Statutes 936; Title 28 U. S. C. A. Section 347).

## Statement of the Case.

This matter involves the interpretation of certain provisions of the Civil Code of Puerto Rico, originally taken from the Civil Code of Spain, and their application to a sale of a herd of cattle of which a portion were found some time after delivery to be suffering from tuberculosis. The Circuit Court of Appeals by a

majority vote reversed the judgment of the Supreme Court of Puerto Rico reversing the interpretation given by the Supreme Court of Puerto Rico to such statutes of Spanish origin and their application to the facts in this case (Tr. p. 50). Circuit Judge BINGHAM dissented and voted for affirmance (Tr. p. 56).

On March 1, 1929, petitioner sold and delivered to respondents 122 head of cattle "of different nature, race, gender, ages and color for the lump sum of $18,000". Of this purchase price the respondents paid petitioner $3,000 in cash and deeded to him a piece of real property as payment of an additional $5,000. They executed mortgages on three additional parcels in favor of petitioner to secure the deferred payment of the balance of the purchase price, amounting to $10,000. (Complaint, Tr. p. 1, *et seq.*)

On March 18th three of the cattle died, and they continued to die up to the time the suit was filed on December 12, 1929. On that date respondents brought this suit before the District Court for the Judicial District of San Juan. The complaint (Tr. 1) alleges the facts just set forth and also alleges that at the time of filing the complaint a total of 43 cattle had died and 29 more had been killed by the Department of Sanitation after the application of tuberculin tests to the herd. The complaint further alleges that the cattle had tuberculosis at the time of the sale but that it was impossible to determine at the time of that sale that the cattle were suffering from any hidden disease (Tr. 3).

The complaint prayed the Court to enter "a judgment declaring null and void, in accordance with section 1397 of the Revised Civil Code" the entire con-

tract of sale; that the Court decree the cancellation in the Registry of Property of the mortgages given to secure the unpaid portion of the purchase price; and for a money judgment in the amount of $8,000, covering the $3,000 cash payment and $5,000 representing the value of the parcel conveyed as part payment upon the sale (Tr. 5).

The complaint sets forth (Tr. 4) the date upon which each of the 43 cattle died, these dates covering a period of over nine months from the date of the sale. Twelve of the cattle had died within forty days from the date of delivery and a total of twenty had died prior to July first.

Petitioner denied the material facts alleged in the complaint except that he admitted the contract as pleaded (Tr. 11). As an affirmative defense he pleaded negligence on the part of the respondents (Tr. 13) and both by demurrer (Tr. 8) and in his answer (Tr. 14) he pleaded prescription.

The Trial Court found that some of the cattle had tuberculosis at the time of the sale and delivery, but made no finding as to the number of cattle diseased at the time of the sale. It is admitted that petitioner acted in good faith and sold the cattle without knowledge that any of them were diseased.

In spite of the fact that the cattle started to die eighteen days after delivery and that twenty of them had died prior to July first, respondents apparently made no effort to discover why the cattle were dying, as it was only by accident that they discovered the presence of tuberculosis in July. The Trial Court found (Tr. 19):

"that in July, Varas a veterinary surgeon came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it;"

There is no evidence included in the record, save the report of an ocular inspection by the Trial Court which has no bearing on the questions involved. The Supreme Court of Puerto Rico had the evidence before it but upon the appeal to the Circuit Court of Appeals the respondents (there appellants) omitted the evidence from the transcript filed there. Petitioner, appellee before the Circuit Court of Appeals, moved that Court to include and print the entire record before the Supreme Court but the Circuit Court of Appeals denied the motion (Tr. 50). Consequently, on all questions of fact the parties here are limited and bound by the findings of the Trial Court, which appear at pages 17, *et seq.* of the Transcript, and any reference to or discussion of the evidence introduced before the Trial Court would be improper.

Upon the facts we would call the Court's attention particularly to two matters, the importance of which will appear later from our argument, to wit:

1. There is no evidence or finding as to how many of the cattle were diseased at the time of delivery. The Trial Court found that some were diseased but did not attempt to fix the number. The Court did find, however, that 50 of the cattle were sound at the time of the

trial (Tr. 23) and this finding was accepted without question by both the Supreme Court of Puerto Rico and the Circuit Court of Appeals and is binding upon the parties here. Respondents, in their brief in opposition to the petition for certiorari before this Court, argued that "it was natural and inevitable that the remaining 50 animals would develop the disease as a result of their contact with the rest of the herd". Respondents are barred from engaging in any such presumption in view of the express finding of the Trial Court that the 50 cattle were in good physical condition at the time the case was tried.

2. There is no allegation in the complaint and no proof or finding that the respondents would not have purchased the sound animals without the defective animals.

The Trial Court held that the entire contract was without consideration and inexistent and that, there being no contract, respondents were entitled to recover the entire purchase price, but that they must return to petitioner the fifty sound animals (Tr. 17).

Upon appeal, the Supreme Court held by a unanimous decision that a breach of Section 1397 of the Revised Civil Code gave rise only to a redhibitory action, an action to rescind for breach of warranty against hidden defects; that here respondents' only right of action was a redhibitory action to recover for the animals actually affected by tuberculosis, and that under Section 1399 of the Revised Civil Code such action was barred prior to the filing of the present

suit (Tr. 24). The Supreme Court held that the demurrer for prescription should have been sustained, reversed the judgment of the District Court, and ordered the complaint dismissed (Tr. 43). The Supreme Court denied a motion for reconsideration (Appendix B).

Upon appeal, the Circuit Court of Appeals by a majority vote reversed the Supreme Court of Puerto Rico and ordered the case remanded with instructions to permit respondents to amend their complaint in the Trial Court in such a way as to seek recovery only of the price of the 72 cattle which had died and been killed. The majority opinion held that the contract of sale might be divided and considered as two separate contracts, one covering the sound cattle and one covering the diseased cattle, or into 122 separate contracts, each for one cow. They held that as to such contract or contracts covering only the diseased cattle, there was a total lack of consideration under Section 1397 and that an action would lie to recover the price upon the theory that the contract was inexistent (Tr. p. 50).

Circuit Court Judge BINGHAM dissented and in a dissenting opinion (Tr. p. 56) held that there was only one contract and that it could not be divided up and treated as separate contracts. He held that there was sufficient consideration to support the contract, that the contract was existent, and that respondents' cause of action was either for damages for breach of warranty or a redhibitory action for rescission, both of which had prescribed.

## Specifications of Errors Urged.

Petitioner respectfully submits that the Circuit Court of Appeals in reversing the judgment of the Supreme Court of Puerto Rico, has erred:

1. In failing to follow the rule established by this Honorable Court that in matters which relate entirely to the construction or application of local statutes, especially those of Spanish origin, the decisions of the Supreme Court of Puerto Rico will not be disturbed or set aside unless they are clearly wrong.

2. In reversing the decision of the Supreme Court of Puerto Rico that plaintiff's right of action was redhibitory and was barred by prescription.

3. In holding that the contract of sale herein was divisible into two or more contracts, and in so interpreting the decision of the Supreme Court of Puerto Rico.

4. In permitting the amendment of the complaint to state a cause of action upon an implied contract for money had and received, when respondents had a remedy upon the express contract for breach of warranty, which had prescribed prior to suit.

5. In permitting the amendment of the complaint to set up an entirely new and different cause of action from that alleged in the original complaint after such new cause of action had been barred by prescription.

# ARGUMENT.

## Summary.

Petitioner will argue that:

1. Respondents' sole right of action was a redhibitory action for the partial rescission of the contract in so far as the diseased cattle were concerned, or an action for a recovery of that part of the sales price corresponding to the value of the diseased cattle, and that such right of action was barred by prescription under Section 1399 of the Revised Civil Code of Puerto Rico prior to the filing of this suit.

2. There was but one contract and such contract was not divisible.

3. The Circuit Court of Appeals erred in permitting respondents to amend their complaint to state a cause of action on an implied contract;

(a) Because respondents had an adequate remedy on the express contract; and

(b) Because the amendment would state a new cause of action already barred.

4. The Court erred in reversing the Supreme Court on matters of Spanish law.

5. The result reached is not just.

## POINT I.

**Pulmonary tuberculosis in an animal constitutes a redhibitory vice, which is a breach of warranty, and gives rise to an action for rescission of the contract, or at the vendee's option, an action for damages for breach of warranty, both of which actions had prescribed when this suit was brought.**

The complaint proceeds upon the theory, and respondents so contend, that the contract of sale was wholly inexistent,—that no contract at all was entered into between the parties,—that the contract was a nullity in toto, and that they are entitled to recover the entire purchase price of the 122 cattle because of the fact that a portion of the cattle were suffering from pulmonary tuberculosis at the time of the sale, and notwithstanding that upon the trial it was admitted and found that 50 head were sound and well. They base this contention upon the following section of the Revised Civil Code of Puerto Rico:

> "Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.
>
> A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

Respondents would disregard entirely the sections of the Code surrounding Section 1397 and consider this section by itself, maintaining that because of this sec-

tion this case is governed by the following sections of the Revised Civil Code.

> "Section 1228.—There is no contract unless the following requisites exist:
>
> 1.—The consent of the parties.
>
> 2.—A definite object which may be the subject of the contract.
>
> 3.—The cause (consideration) for the obligation which may be established.
>
> Section 1238.—All things, even future ones, which are not out of the commerce of man, may be objects of contracts."

Respondents maintain that since under Section 1397 cattle suffering from a contagious disease could not be the subject of a contract of sale, there was "no definite object which may be the subject of the contract" and likewise no "cause (consideration) for the obligation".

Petitioner contends, and the Supreme Court of Puerto Rico so held, that it is clear from the context of Section 1397 and its position in the Civil Code, the history of the section itself, and from the opinions of the Spanish commentators, that pulmonary tuberculosis in cattle is a hidden defect and, like any other hidden defect in an animal or thing sold, is a breach of warranty and gives rise to an action for damages for breach of warranty (a proportional reduction of the price under Sections 1389 and 1394 of the Code), or an action to rescind the contract in whole or in part, as the case may be, for such breach of warranty. Petitioner contends, and the Supreme Court so held, that notwithstanding the breach of warranty there was an

existing contract between the parties which cannot be adjudged to be an inexistent contract under Section 1228, and that the true meaning of Section 1397 is that the contract is not void but voidable.

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this point, but far from being clearly wrong the decision of the Supreme Court is clearly right on principle and is supported by the overwhelming weight of authority.

Section 1397 is not placed in that chapter of the Civil Code which treats of "Nullity of Contracts" (Chapter VI of Title II of Book 4th), but in Title IV which treats of "Contracts of Purchase and Sale" in a subdivision entitled "Warranty against hidden defects of or burdens on the thing sold". This subdivision comprises 16 sections of the Code, all dealing with the warranty against hidden defects. For the convenience of the Court we are printing the entire subdivision as Appendix "A" to this brief.

Sections 1387 and 1388 make the vendor liable for hidden but not for patent defects; Section 1389 gives the vendee an option to withdraw from the contract or demand a proportional reduction of the price; Sections 1390 and 1391 refer to a loss of the thing sold; Section 1392 refers to warranties in judicial sales, and Section 1393 provides a six months' Statute of Limitations on actions based on the preceding sections. Section 1394 is peculiarly applicable to the present case. It provides:

> "Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the red-

> hibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.
>
> This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same."

Section 1395 makes the provisions of the preceding section applicable to things other than animals. Section 1396 provides:

> "Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, *except in the case prescribed in the following section.*" (Italics ours.)

Then follows Section 1397 (*supra*), upon which respondents rely. Section 1398 provides that if the hidden vice is such that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory, but if the veterinarian by negligence or bad faith fails to discover it, the veterinarian shall be liable. Section 1399 then provides the Statute of Limitations which the Supreme Court held to bar the present action, as follows:

> "Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee unless, by reason of the customs in each locality, longer or shorter periods are established."

Section 1400 treats of the death of an animal within three days after delivery. Section 1401 requires the return of the animals sold if the sale be rescinded, and Section 1402 gives to the vendee of animals suffering with redhibitory vices, the option to withdraw from the contract or demand a proportional reduction in the price.

This whole chapter or subdivision was copied from the Spanish Civil Code of 1889, which was in force in Puerto Rico at the time of the change of sovereignty. We submit that clearly these sections were intended to constitute and do constitute a complete statute covering the matter of warranty against hidden defects and that all of its sections are parts of an integrated plan and must be read together. We submit, and the Supreme Court so held, that Section 1397 refers to a warranty against hidden defects just as much as do the other sections in the Chapter. The Legislature could never have intended to interpolate into this statute on warranties a section covering the inexistence of contracts which in itself would negative any idea of a warranty. If the contracts referred to in Section 1397 were inexistent, clearly there would be no warranty, as there would be no contract upon which to fasten the warranty, and yet this section appears as an integral part of this Statute covering warranties.

Upon the question of whether the contagious diseases referred to in Section 1397 constitute a redhibitory vice and a breach of warranty as maintained by petitioner, or whether they make the contract wholly inexistent and hence preclude the possibility of any

warranty, as contended by respondents and as held by the Circuit Court of Appeals, the concluding phrase of Section 1396 (italicized above) is peculiarly enlightening. This section provides that the warranties against hidden vices of animals shall not obtain in sales made at fairs, etc., "except in the case prescribed in the following section", and the following section is the disputed Section 1397 referring to contagious diseases. Unless the Legislature understood and intended that the contagious diseases referred to in Section 1397 were hidden vices, and a breach of warranty, the last clause of Section 1396 would be absolutely meaningless.

The history of this legislation shows conclusively that pulmonary tuberculosis in cattle was understood and intended by the Legislature to be a redhibitory vice and subject to the short Statute of Limitations contained in the present Section 1399 (*supra*).

**(a) The applicable legislation and commentaries thereon.**

The Enciclopedia Juridica Espanola (Spanish Legal Encyclopedia) traces these sections on warranty and especially the redhibitory action based on defects in the thing sold back to the time of the Aediles in Rome. Defining the redhibitory action, the Enciclopedia says (Translating from Vol. XXVI, p. 884):

> "An action of the Roman Law available to the vendee in a contract for sale.
>
> "According to a special provision of the aedelician edict, the vendor was responsible for all hidden defects (*morti vitra*) which the thing sold had at the time of the contract, even though

> they were known to him and he was likewise responsible for all the stipulated qualities which the thing should have or should not have (*dicta promissa*). So that when the thing sold had hidden defects or when the *dicta* and *promissa* qualities were not established, the vendee might always elect either to demand the rescission of the contract or a diminution of the price, both where the defects were capital as well as where they were secondary.
>
> "In the former case the action exercised was the '*actio redhibitoria*' which prescribed in six months when the vendor had given bond for the defects of the thing sold and in two months when it was otherwise. The redhibitory action could be resorted to only once * * *.
>
> "Our private law has substantially adopted the redhibitory action when authorizing the rescission of contracts of sale by reason of defects in the thing sold, under the general Civil Law as well as under the special Commercial Law, and it distinguishes between defects easily detected upon examination by the vendee and hidden defects when fixing the period of time available for the rescission."

With special reference to the subject of vices in animals or things sold, and commenting on the applicable provisions of the Spanish Civil Code (identical with the corresponding enactments in force in Puerto Rico), the encyclopedia says:

> "*Civil Code. Concept and basis of the doctrine of redhibitory vices.* The Civil Code uses the expression 'redhibitory vice' in referring to the vices of animals; but in the same connection it also uses the expression 'hidden vices', gen-

> erally employed by the Code when referring to vices in the thing sold. In view of the enactments set forth in the Code and the etymology of the word 'redhibitory', we really think that this adjective may be applied to all the vices, whether in animals or in things sold, which may cause a rescission of the sale, and that the two expressions *'hidden vices' and 'redhibitory vices' are therefore equivalent.*" (Vol. XXX, p. 798.)

The encyclopedia has defined the term "redhibitory vice" thus:

> "Redhibitory Vice. Common civil law (3). 1st concept. Etymologically, a redhibitory vice is one which gives rise to the return of the thing.
>
> "Historically, the concept has been rendered more definite and the term now serves to designate those *hidden defects* or vices in the things transferred by sale which either render such things unfit for their normal service or greatly diminish their usefulness, and which for this reason may give rise to a rescission of the sale." (Id., p. 797.)

Referring to Articles 1493 and 1494 of the Spanish Civil Code (corresponding to Sections 1396 and 1397 of the Puerto Rico Code, upon the latter of which plaintiffs base the present action, the Enciclopedia is of the opinion that when the code uses in Article 1494 the word "void" it does so inadvertently and really means "voidable". It says (translating):

> "In making this exception (that of Art. 1493) regarding the existence of a warranty, the

Code says that such warranty shall not obtain in the two instances to which we have just referred, '*except in the case prescribed in the* following article.' This expression definitely suggests that in the case of the said following article warranty shall obtain.

* * * * * * *

"The Article to which we refer says that cattle or animals suffering from contagious diseases shall not be the subject matter of a contract of sale and that any contract made with respect to the same shall be void, and immediately adds that a contract of sale of cattle or other animals, when the use or service for which they are intended having been stated they are found to be useless therefor, shall also be void.

"Should this Article be understood in its literal sense? If so, then the words *except in the case mentioned in the following article* used in the preceding article are mere surplusage, because the redhibitory action arising from warranty has important differences which distinguish it from the action for nullity. Must it be understood that Article 1494, in speaking of nullity, does so by inadvertence and defectiveness of expression? This hypothesis cannot be excluded, for the authors of the Code did not always frame its provisions in a precise language." (Id., pp. 801-802. Italics ours.)

Q. Mucius Scaevola, the great commentator on the Spanish Civil Code, in discussing Articles 1493 and 1494 of that Code, uses this forceful language (translating):

"This subject of the sale of animals has been brought into the Code in fragments, which form

a veritable juridical crazy-quilt made up of all sorts of materials and hues. The contrast exhibited by the provisions as against each other is as striking as it is queer; the deficiencies noted are as numerous as they are regrettable; and were it not for the fact that, in reality, notwithstanding their divers origin and the independence with which they clothe themselves, they all respond essentially to very well known and old principles which are identified through them, it would be practically impossible at times to ascertain the intention of the legislator.

"The two articles which we have before us (corresponding to Sections 1396 and 1397 of the Civil Code of Puerto Rico) are good proof of these conclusions, for, looking at their phraseology only, they appear to seek entirely different purposes, whereas essentially they are perfectly consistent. As regards the legal terms they use and the accuracy of their provisions, they are likewise objectionable. Thanks to the good fortune that these articles apply to causes, which are generally of small import and can be determined in oral trials (*juicio verbal*), the consequences will not be very serious. Otherwise, both these articles and all which follow in the same section would render themselves famous in the annals of Judicial administration." (23 Scaevola, p. 655.) (Matter in parentheses added.)

Referring to the opinion thus expressed by Scaevola, the Supreme Court of Puerto Rico in its opinion in this case says:

"This *crazy-quilt* (edredon), as Scaevola characterized it, has impelled us to make a wider examination of the authorities than is ordinarily necessary.

"Up to 1889, when the Spanish Civil Code was passed, it may be noted that the time in which a redhibitory action should be brought was a limited one: from time immemorial a period of not more than six months. If by Section 1397, to take the extreme case, the legislator thought that the existence of a contagious disease would render a contract for the sale of cattle non-existent, did the legislator show any intention of preventing such an action from ever prescribing? As some of the commentators say, it seems inconceivable that the intention was to prevent such an action from prescribing or relegate the prescription to the term of four years determined by the chapter on the nullity of actions, or to the period of fifteen years provided in the code for the limitation of actions when no term is otherwise provided.

"As the prescription of forty days was first introduced into the code along with the reformed precept of Section 1397 (1494 of the Spanish code) the strong probability is that the legislator thought that a shorter period than formerly was advisable. We have elsewhere made the comment that the Spanish legislator probably did not have tuberculosis in mind. The only way to harmonize the whole matter is to conclude that the legislature continued to think that the obligation incurred by a vendor of cattle with a contagious disease was responsive to a redhibitory claim that the purchaser had, and the legislature also had in mind that the period of prescription for all redhibitory actions, including those involving animals affected with contagious diseases, should be short. For other occult vices in sale of property the prescriptive period of six months prevails. The way to harmonize the whole chapter is to declare that the legislature was fixing different periods of pre-

scription for every occult vice enumerated therein; in other words, a period of six months for ordinary vices and a period of forty days when animals were involved. It may even be that the legislature had in mind contagious diseases in animals when it fixed the prescription of forty days, inasmuch as most diseases of that nature would come to light before that time.

"The introduction in 1889 of a period of prescription of forty days and the enactment of Section 1397 at the same time would be a strange coincidence, if they had no relation to each other." (Tr. pp. 39-40.)

The Spanish commentator, Modesto Falcon, in his work on the Civil Code, says in referring to the warranty against hidden defects (translating):

"As the hidden defects which give rise to the warranty have always been called redhibitory vices, the warranty obtaining in such cases is similarly named, and likewise the action available to the vendee. The effect of redhibition is that the vendee may elect to rescind the contract or demand a proportional reduction of the price. If he elects the former, the vendee and the vendor must restore to each other, respectively, the thing sold and the price, and in addition thereto, the expense which the purchaser may have incurred must be reimbursed to him. If he elects the latter remedy, in absence of a contrary stipulation, experts appointed by both parties will determine the amount of the depreciation occurred in the thing sold by reason of the hidden defects or encumbrances discovered therein.

"When the thing sold is lost on account of the hidden defects, the loss falls on the vendor, who must return the price, and pay the expenses

incurred, with damages, if he acted in bad faith." (4 Falcon, p. 230.)

And referring particularly to the sales of animals and to the special rules to which such sales are subject by reason of the frequency of the hidden defects and the greater ease with which they can be concealed, the same author says:

"The sale of animals is subject to most special rules by reason of the frequency of hidden defects and the greater ease with which they can be concealed. Because of this the rules enacted by the codes are quite special. Some of the codes specify the hidden vices or diseases which are designated as redhibitory and thus give rise to a warranty. Accordingly, they group cattle in various classes. It was so proposed in our project for the Code of 1851, and accomplished by the Austrian and Bavarian codes. The majority merely set forth the general rule, which in the case of some, such as the French Code, has been supplemented by special legislation. This is the system adopted by our own code, and article 1496 thereof has a future law in contemplation when it referred to vices or defects specified by law.

"Where several animals are sold together and redhibitory vices are discovered in some of them, the warranty operated only as to the latter; but this rule does not apply where it clearly appears that the vendee would not have purchased all of the animals had he known that some were defective—as in the case of teams of horses or of mules, yoke of oxen, and other animals dealt in pairs.

"In sales of cattle made at fairs or at public markets the *warranty against hidden vices does*

> *not obtain, except when the animals are suffering from contagious diseases, or when the service for which the animals are intended having been stated in the contract, they are found later to be useless therefor.''* (Id., p. 230. Italics ours.)

In his Commentaries on the Spanish Civil Code, Vol. 4, page 507, don Leon Bonel y Sanchez, referring to Article 1494 of that Code (equivalent to Section 1397 of the Civil Code of Puerto Rico), cites with approval the classification of the redhibitory vices made by the authors of the Spanish Code Draft or Project of 1851 and (at p. 508) considers *pulmonary tuberculosis* as a *redhibitory vice.*

The commentator Don Antonio Martinez Ruiz, in his work on the Spanish Civil Code, Vol. 9, pp. 356-363, considers Articles 1491 to 1499 of that code, relating to the sale of animals, including, of course, Article 1494 (equal to 1397 of the Civil Code of Puerto Rico), the first paragraph of which provides in effect that cattle and other animals suffering from contagious diseases cannot be the object of a contract of sale and that any contract made with respect to the same shall be void. Referring to the above articles as a whole, the commentator says (pp. 362-363):

> ''In all of the articles considered in this commentary mention is made of redhibition, that is, of the vendee's right to rescind the contract. This is not, however, the only right given to him to compensate whatever damages the vices or defects of the animals sold may have caused him. Article 1499 makes extensive to sales of cattle and other animals the provisions of article 1486, under which the vendee may elect—with-

out anything to limit this right of election—to withdraw from the contract, the expenses which he may have incurred being returned to him or be reimbursed a proportional part of the price, according to the judgment of experts.

"The time within which any of these actions—whether for rescission of the sale, or a diminution of the price—must be exercised is not the one provided in Article 1490, but that established by the customs of the locality or, in the absence of these, that fixed by Article 1496—forty days."

Don Florencio Garcia Goyena, Chairman of the Commission which prepared the Civil Code Draft or Project of 1851, Article 1416 of which served as the model for Article 1494 of the code finally enacted (corresponding to Section 1397 of the Civil Code of Puerto Rico), in his work entitled "*Febrero Novisimo*" (Vol. 2, p. 406), treats of the actions accruing to the buyer as against the seller where the thing sold is subject to some defect. In dealing as a whole with the subject of redhibition, this author says:

"*Actions accruing to the vendor as against the vendee in case of defects in the thing sold.*

"3288. Where property whether it be real property, including hereditaments or lands producing bad grade houses or other buildings subject to a servitude, charge, or personal property, including merchandise, books, and animals, such as horses, mules and other like animals has any defect, fault or disease, the vendor must acquaint the vendee with that fact, and if such fact is concealed from the latter he may proceed against the former in two actions.

"The first one, which is called redhibitory action, whereby a rescission of the contract is sought each one of the parties recovering whatever he delivered to the other. This action may be brought within six months, counted from the date of the sale.

"The second action, which is known as action *quanti minoris* (estimatoria) may be brought within one year after the sale and has for its object the recovery by the vendee from the vendor of an amount representing the deficiency in the value of the thing sold by reason of the concealed defect, fault or vice: Laws 63, 64 and 65, Tit. 5, Partida 5.

"3289. If the vendee acted in bad faith, he is bound to indemnify any damage sustained by the buyer.

"3290. The buyer will not be entitled to bring the said actions in the following cases:

"1. Where the defect, fault or vice of the thing sold is visible.

"2. Where the seller has stated that it had them.

"3. Where he bound himself not to sue and so stated in the stipulation of the contract of sale, of which we will treat in the corresponding section.

"3291. The above actions may be brought not only with respect to things sold but also in regard to those exchanged and those given in payment or by way or dowry equivalent to a sale; all this without prejudice to the right to bring an action on the ground of fraud or 'lesion', amounting to approximately one-half of the just price, for although both these actions

> are similar in effect, their grounds are different, because the action for fraud or 'lesion' is based on the unjustness of the price, whereas the redhibitory action and the action *quanti minoris* have as their basis the lesser value which the thing sold has by reason of the fault, vice or defect." (Id., Vol. 2, p. 406.)

In his Commentaries on the Spanish Civil Code, Vol. 10, page 253, Don Jose Maria Manresa y Navarro comments favorably on the report rendered by the Board of Professors of the Superior School of Veterinary at the request of the authors of the Civil Code Draft or Project of 1851. With this report in mind, Professor Sainz y Rozas, of the School of Zaragoza, whom Manresa considers a learned author, in his work "*Tratado de Jurisprudencia Comercial Veterinaria*", page 56, states the view that in Spain the redhibitory vices and the periods prescribed for bringing the corresponding action are, with respect to cattle, those which Manresa enumerates "believing that knowledge thereof will be useful in practice," as follows:

| | |
|---|---|
| "The inversion or fall of the uterus or vagina prior to the making of the contract | 9 days |
| "Polmonary tuberculosis | 15 days |
| "Epilepsy | 30 days |
| "The vice of sucking cows (*mamonas*) | 9 days |
| "Any condition resulting from the non-expulsion of the placenta, provided the parturition has not taken place while the cow was in the possession of the buyer | 9 days." |

(10 Manresa, p. 254.)

Manresa further says in this connection "that the above enumerated vices or defects, in order to cause the rescission of the contract, must be hidden in the sense in which we have used this term in commenting on Art. 1484".

The Spanish Civil Code of 1889 (containing the same sections as the sections of the Puerto Rico Code comprising the chapter on warranties against hidden defects printed in Appendix A) was taken largely from the Spanish Civil Code Bill or Project of 1851 referred to in the foregoing quotation. This Project of 1851 has often been called the parent of the Civil Code of 1889. Article 1416 of the Project of 1851 is practically the same as the first paragraph of the present Section 1397 of the Puerto Rico Code. It read:

> "The sale of cattle or other animals suffering from contagious diseases is prohibited, and any contract made with respect to the same shall be void."

This article appeared in the Project of 1851 in a chapter entitled "Warranty Against Hidden Defects or Encumbrances of the Thing". Project of 1851, however, went on to define and enumerate such hidden defects or redhibitory vices, as follows:

> "1420. With respect to cattle, the following constitute redhibitory defects:
>
> "1. The condition resulting from the non-expulsion of the placenta and the reversion or fall of the uterus or vagina, provided that the parturition took place while the cow was in the possession of the vendor.
>
> "2. *Pulmonary tuberculosis.*

"3. Epilepsy.

"4. The vice of sucking cows (*mamonas*).

"1421. In the case of subdivision one of the preceding article, the action must be brought within nine days. In the case of the other three subdivisions, with *fifteen days*." (Italics ours.)

Thus we see that as far back as 1851 and in the Project which was the direct source of the legislation we are now discussing, pulmonary tuberculosis in cattle was specifically named as a redhibitory defect, which is the petitioner's contention in this case. The Supreme Court of Puerto Rico so decided but was reversed on this point by the Circuit Court of Appeals.

As stated, Article 1416 of the Code Project of 1851 prohibited and penalized with an *apparent* nullity the sale of animals affected with or suffering from contagious diseases. But the same Project also contained general provisions in a separate chapter relating to the nullity of contracts. Therefore, if by express provisions of that Project, bovine tuberculosis was regarded as a redhibitory vice, it was because the authors of the proposed legislation intended to regulate the matter of vices or diseases in the sale of animals, within the field of the redhibitory actions, and not to include it in the scope of general rules in regard to the nullity of contracts. Not only was the existence of pulmonary tuberculosis characterized as a redhibitory vice, but a limitation of fifteen days was prescribed (Art. 1421) by the said Project for the exercise of the action based on such a vice.

Referring to the short statute of limitations provided by the present Puerto Rico Code and that provided by the Project of 1851, the Supreme Court of Puerto Rico says in its opinion:

> "What the legislature in Spain had in mind probably was that a contagious disease would manifest itself within forty days. No particular attention was given to the thought that a longer time might perhaps be necessary where tuberculosis was concerned. In any event the statute fixed forty days unless the local usages required a different period. *Ad ea quae frequentious accidunt jura adaptantur.* So much was this so that at the time of the preparation of the proposed bill of 1851 the veterinary experts thought that fifteen days was a reasonable time within which to bring a redhibitory action on account of bovine tuberculosis." (Tr. 38.)

Respondents filed a motion in the Supreme Court of Puerto Rico for reconsideration of the judgment by the Supreme Court ordering the dismissal of their complaint in this case. The Supreme Court rendered an opinion denying the motion for reconsideration, which does not appear in the transcript in this court for the reason that it was not made a part of the record in the Circuit Court of Appeals, but the opinion is printed in Spanish in the Official Edition of the Puerto Rico Reports at 46 D. P. R. 909. In that opinion the Supreme Court of Puerto Rico says (See Appendix B):

> "Assuming, however, with the proponents of the motion for reconsideration, that the sale of the animals shown to be affected with a contagious disease was entirely inexistent, never-

theless, we think that the terms of Section 1399 of the Civil Code should prevail. From time immemorial the action accruing to the purchaser of animals affected with a contagious disease was a redhibitory one. The fact, therefore, that the code perhaps made such a sale inexistent did not affect the total theory of the chapter. The essential idea of our code and of other codes was that a purchaser who had a right to annul a sale of diseased animals should begin his action within a certain limited time, in this case forty days. It makes no difference, from our standpoint, whether the action should be styled one of nullity, or of rescission, or of inexistence, or any other action arising in practice. As we pointed out, the time for filing a redhibitory action used to be at least six months, but the Legislature of Spain, *if its theory was that the sale was entirely null and void, was seeking to give the vendor some protection, and that was the possible reason why the term of 40 days was fixed. It could never have been the intention of the Spanish Legislature that a sale in good faith of diseased animals should be annullable for all time or even for the four-year period which ordinarily applies to actions for nullity.*" (Italics ours.)

It is the view of Don Jose Castan Tobeñas, Professor of Civil Law of the University of Valencia, as well as Scaevola, Manresa, Bonel y Sanchez and other commentators, that in the absence of any section in the present Code specifying the redhibitory defects in cattle, such as Article 1420 of the Project of 1851 did (*supra*), resort should be had to the enumeration of such vices set forth in the 1851 Project. In his Derecho

Civil Espanol Comun y Foral, Vol. II, page 363, he states (translating):

> "That the vice or defect in question should be determined as such by the law or local usage (Art. 1496, second paragraph). The special law above alluded to not having been enacted, the local usages only need be considered, and the latter—in the opinion of Scaevola—are those which the professional veterinarians may regard as binding in a given locality. Resort should be had to the enumeration of the redhibitory vices in animals contained in the Project of 1851 and those set forth in the works on veterinary law, among these the treatise on Commercial Veterinary Jurisprudence (Tratado de Jurisprudencia Comercial Veterinaria), written by Sainz y Rozas."

Don Calixto Valverde y Valverde, Professor of Spanish Civil Law in the University of Valladolid, in his Tratado de Derecho Civil Espanol, Vol. II, page 371, *et seq.* says (translating):

> "The Civil Code, in dealing with the subject of warranty, mentions the warranty obtaining in the sale of animals. The Code starts by a recognition of the existence of a warranty in connection with the sale of animals affected with a redhibitory vice, and regulates the matter in detail. Its provisions are as follows:
>
> "if the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

"But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable in damages.

"The redhibitory action, based on the vices or defects in the animals sold, must be instituted within forty days counted from their delivery to the vendee, unless, in accordance with the customs of the locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with respect to such vices and defects thereof as are recognized by law or local usages."

He goes on to state that, to identify the redhibitory vices and thus overcome the difficulty resulting from a lack of any special legislation on the subject, the experts resort to the Code Project of 1851, wherein such vices are specified. In referring to the views of Manresa and of Sainz y Rozas, on this matter, Valverde says:

"From the above cited provisions it should be inferred that in the sale of animals the only redhibitory vices to be recognized as such are those established by statute or local customs, as provided in Article 1496. Such a statute, which would specify the said redhibitory vices, has not as yet been enacted in Spain, and to overcome this difficulty the experts resort to the Code Project of 1851, which enumerates them; and Mr. Manresa thinks that special attention must be given to what has been written on this subject by Mr. Sainz y Rozas in his Treatise on Veterinary Jurisprudence, which enumerates the vices and designates the periods within which the corresponding actions must be

> brought, regard being had for the customs of the locality; and it is to be observed that the limitation period of forty days prescribed for the redhibitory action in the sales of animals is a term which may be modified by local customs." (Id., p. 374.)

In the Enciclopedia Universal Ilustrado Eurepeo-Americana, we find the following concerning the warranty against hidden vices in animals, at page 1291, Vol. 53 (translating):

> "* * * The redhibitory action only lies for such hidden vices as are established by statute or local customs. No special law has been enacted, and therefore regard must be had for the local customs. However, the Code provides that any vice shall be considered as redhibitory, if it should be of such a nature that even if a professional inspection has been made, the knowledge of experts is not sufficient to discover it, and, further, that the veterinarian shall be liable in damages if through ignorance or bad faith he should fail to discover or to give notice of it. (Articles 1496, second paragraph, and 1495.) Of course, all contagious diseases and those rendering the animals useless for the use or service stated in the contract as the one for which they were acquired, are to be considered as redhibitory vices also, since they produce the nullity of the contract. (Article 1494.) * * * "

Respondents base their entire case upon the word "void" as used in Section 1397 of the Puerto Rico Code and they would interpret that word to mean "inexistent" contrary to all of the Spanish commen-

tators which we have cited. Petitioner maintains that the word "void" as used in this particular instance does not mean "inexistent" but "voidable" and the Supreme Court of Puerto Rico sustained this view. In its opinion denying reconsideration (46 D. P. R. 909) the Supreme Court said (See Appendix B):

> "In writing our original opinion we never lost from view the fact that the firm of Alonso Hermanos was maintaining that a sale of animals that were affected by a contagious disease was entirely null, void and inexistent.
>
> "In part the theory of the opinion, taking the whole history of contracts for the sale of animals, was that Section 1397 of the Civil Code ought to be understood as giving a right to annul rather than making the contract absolutely void. This was the rule from time immemorial in Spain, and the intention of the Legislature to change it should appear clearly. * * *"

The Supreme Court of Puerto Rico and the Spanish commentators have interpreted the word "void" as used in this statute to mean "voidable". They have given the word this interpretation because of the history of the section, the language of the sections surrounding Section 1397 which clearly indicate such interpretation, and the fact that the word occurs here in a section of a chapter devoted not to inexistent contracts, but to contracts which may be rescinded for break of a warranty against hidden defects. That such interpretation of the word is usual rather than otherwise is shown by the following excerpts from Corpus Juris:

"Void is not always used in an absolute or in its literal sense: it may be and often is used in the sense of 'voidable'. Matters which are properly 'voidable' are very commonly spoken of as 'void'; the two words are often used interchangeably. Indeed, *'void' is so often used in the sense of 'voidable' as to have almost lost its primary meaning; and it has been said, that whatever may be avoided, may in good sense, to this purpose, be called 'void'.*

* * * * * * *

"* * * *If there is nothing in the other language of the statute to indicate the sense in which the word was used, the general purpose of the statute, the prior rule of law on the subject, and the consequences of either construction, may be considered.*" (Italics ours.) (67 C. J. 167-169.)

and in the following definition from Bouvier's Law Dictionary:

"VOID.—That which has no force or effect. *This word is often used as in effect meaning 'voidable' only;* Bennett v. Mattingly, 110 Ind. 202, 10 N. E. 299, 11 N. E. 792; *and is seldom, unless in a very clear case, to be regarded as implying a complete nullity,* but is to be taken in a legal sense, subject to a large qualification in view of all the circumstances calling for its application and the rights and interest to be affected in a given case. Brown v. Brown, 50 N. H. 552. See Kearney v. Vaughan, 50 Mo. 287." (Id., Third Revision, vol. 3, p. 3406.) (Italics ours.)

**(b) Plaintiff's only right of action was under Section 1394.**

Thus far we have discussed the theory of the Civil Law principles governing actions for breach of warranty for hidden defects and what we have said would be applicable if the contract of sale covered a single tuberculous cow or if all the cattle sold had been tuberculous. However, the actual facts as found by the Trial Judge, and accepted both by the Supreme Court of Puerto Rico and the Circuit Court of Appeals, were that only a part of the animals were tuberculous. While 72 of the 122 cattle sold died, or were killed, within a little more than nine months after delivery, there is no evidence or finding as to how many of these animals were tuberculous when delivered. In fact there was no test made for tuberculosis or no examination by a veterinary until many months after the cattle had been delivered. However, there is an express finding that even at the trial, which must have occurred a considerable length of time later, since the opinion and judgment were rendered on January 12, 1931 (Tr. 23), the remaining 50 cows were "in good physical condition." Therefore at least 50 of the cattle, and we do not know how many more, were admittedly not suffering from any defect at the time of delivery.

Under these circumstances plaintiff's right of action was governed, not by Section 1397, but by Section 1394 of the Puerto Rico Civil Code which covers the precise situation and which provides:

> "Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum

> or for a special price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.
>
> "This is presumed when a team, yoke, pair or set is bought, even when a special price has been fixed for each one of the animals composing the same."

There is of course no evidence in the case that the plaintiffs would not have purchased the sound animals without the defective ones, so that the exception is irrelevant here.

In discussing Section 1491 of the Spanish Code which is identical with Section 1394 of the Puerto Rico Code, *supra,* Scaevola in his commentaries on the Civil Code gives two illustrations falling under this section in which the facts presumed are exactly the same as the facts now before the Court. In one instance he presupposes the case of the sale of cows, one of which turned out to be tuberculous, and holds that in such case the right of action of the purchaser is a redhibitory action to rescind or to claim that reduction in the sale price corresponding to the value of the one tuberculous cow. He says (translating):

> "*Doctrine of Article 1491.* 1st. Case to which it applies—The case is where 'two or more animals (and in general two or more things) are jointly sold,' whether for a lump sum or for a special price set on each of them. The Code takes no account, as a general rule, of *the joint character* of the sale, or even of the *unity* of the

price, for the purposes of the warranty by the vendor. It assumes, on the contrary, that even in a single sale for a lump sum such circumstances *do not imply the consolidation into a single whole* of the things bought, whose individuality and singularity it aims to preserve as much as possible.

"We have bought a flock of *one hundred sheep*, of which one, five, ten, turn out to be sick and useless in a greater or lesser degree (Article 1484). Although we have paid for the herd a lump, gross, sum, the Code considers, as regards the responsibility of the vendor, *that we have acquired the sheep one by one*, and hence that we are entitled to the redhibition of the defective ones and *must inevitably accept the others.*

* * * * * * *

"2nd. *General Effect.*—The provisions of Article 1491 regarding the contemplated situation which is its main origin, are very clear and logical. Suppose ten animals, ten cows, had been bought and one of them turned out to be suffering from tuberculosis and was rejected in the slaughterhouse. The redhibition then *lies of this defective animal*, with the consequences established, *both in the case of the total loss of the animal and where the purchaser is unable to use the same*, by Sections from 1486 to 1488. It can not be doubted that in this supposed case both the *quanti minoris* and the redhibitory actions lie, because it is evident that although Section 1491 *contains the word redhibition*, its provisions are not confined to the effect of the *rescission of the contract*, which is the proper object of the latter of the said two actions; firstly, because when using the word redhibition as meaning redhibitory vices, *a generic expres-*

*sion is used;* and secondly, because the greater, which is the redhibitory action, includes, correctly construed, the lesser, which is the *quanti minoris* action. If any doubt existed in this respect, the language of Section 1499 would immediately dissipate it.

"The purchaser, therefore, shall be entitled to the rescission of the contract with a *proportional* reimbursement of the expenses thereof, and, in a proper case, with compensation for the proper damages, or he might confine his action to claim a reduction of the purchase price or the whole of it; all of which in the terms used when dealing with sections from 1486 to 1488." (Italics ours.) (Id., Vol. 23, pp. 648-651.)

Under the facts shown by the Record, plaintiff's remedy falls not under Section 1397, but under Section 1394. Their contention that the contract is inexistent rests upon the argument that there was no consideration and no licit object of the contract, inasmuch as Section 1397 makes the sale of cattle suffering contagious diseases void. Here the record shows there was a consideration and a licit object in that at least 50 of the cattle sold were healthy. There is no provision in Section 1394 that when part of the animals are defective the contract shall be "void" even as to such animals, but on the contrary the section provides for the redhibition (rescission) of the contract as to such defective animals. It is therefore wholly immaterial on the actual facts presented in the record what interpretation we give to the word "void" as used in Section 1397. The fallacy in the majority opinion of the Circuit Court of Appeals is that it seeks to take

the word "void" out of Section 1397 and interpolate it into Section 1394 when the plain language of Section 1394 is exactly to the contrary.

The Supreme Court of Puerto Rico held, and we believe properly, that the plaintiff in accordance with Section 1394 had a right of action to rescind the sale as to the defective animals or to receive a reduction in the sale price equal to the decrease in the value of such animals, but that such action not having been brought within the 40-day period provided by Section 1399, the right of action had prescribed.

**(c) The criminal statutes are irrelevant.**

The Circuit Court of Appeals reversed the Supreme Court of Puerto Rico upon this fundamental question of Spanish law largely through a mistaken application of certain sections of the Penal Code of Puerto Rico which are totally irrelevant. The majority opinion states (Tr. p. 52):

> "Other sections of the Code deal with the same subject matter, i. e., cattle infected with contagious diseases, and must be considered in this connection."

The Court then copies Sections 351, 352 and 356 of the Penal Code and a criminal statute of March 14, 1907, and continues:

> "These sections in connection with others which it is unnecessary to quote, taken together, form a plan of dealing with the menace to public health occasioned by diseased animals. Section 1397 is obviously an integral part of this plan

> and should be so considered. The Supreme Court of Puerto Rico does not seem to have had this aspect of the matter in mind. It is not referred to in the opinion, nor are the sections just quoted referred to. * * * But we see no escape from the conclusion that the Supreme Court of Puerto Rico overlooked important provisions of law and erred in disregarding the plain language of Section 1397."

The Circuit Court of Appeals states and apparently understood that the sections of the Penal Code which it quotes were a part of the Civil Code, with which, of course, the Penal Code has no relationship. The Civil Code, of which Section 1397 forms a part, is a Spanish statute founded upon Roman law, and the principles set forth in the chapter on warranties go back many centuries, while the Penal Code is a statute of American origin adopted in Puerto Rico for the first time after the American occupation and having no connection with any Spanish or Roman law. Obviously the sections of the Penal Code copied in the opinion which were taken from the criminal law of one of the American States can have no connection with the provisions of the Civil Code of Spain as to warranties, which antedated the criminal statute by many years. To hold that these sections of the Penal Code and Section 1397 of the Civil Code are integral parts of a coordinated plan was clearly erroneous.

The obvious answer to this argument of the majority of the Circuit Court Judges is of course that the criminal statutes referred to cover only the sale of animals by a vendor who knows them to be contaminated with a contagious disease, and in the present

case it is admitted that the petitioner had no such knowledge.

Nor did the Supreme Court of Puerto Rico overlook these sections of the Penal Code. In denying the respondents' motion for reconsideration, the Supreme Court said (translating from 46 D. P. R. 910; Appendix B):

> "The proponents of the motion now draw our attention to the provisions of the law making a vendor of diseased animals subject to a criminal prosecution. The answer to this suggestion is that the law only covers the sale of animals knowing them to be contaminated with a contagious disease. The Puerto Rican Legislature thought that such an act was criminal and so declared, but the fact that it declared it to be criminal does not necessarily affect the rights between parties, especially where there is no bad faith. The idea of the Spanish Legislature, and it is our own, was *Interest Reipublicae ut sit finis litium.*"

We submit that under the overwhelming weight of authority on this question of Spanish law, respondents' remedy was to sue under Section 1394 for a partial rescission of the contract and that such right of action had prescribed under Section 1399 and that the complaint was properly dismissed by the Supreme Court.

## POINT II.

**The Circuit Court of Appeals erred in holding that the contract could be divided and that as to the cattle suffering from tuberculosis, the contract was inexistent.**

Clearly the contract was not inexistent under Section 1228 (*supra*) for lack of a licit object or consideration. At most there was a partial lack or partial failure of consideration and the 50 cattle which were admittedly sound and well were sufficient consideration to support the contract.

The prevailing opinion of the Circuit Court of Appeals admits this and holds that if the contract be considered as a single contract, then the action must fail and the judgment of the Supreme Court be affirmed. The Court says (Tr. p. 55):

> "If the herd of cattle which were sold be regarded as a unit and as the thing which was sold, a different result would be reached because about fifty of the cattle were sound and were legitimate objects of sale. The thing sold was not therefore completely unlawful as an object of commerce; the good portion of it would pass to the vendee and would have to be returned by him if he elected to rescind; the action would be redhibitory in character and would be limited by the provisions of section 1399."

The majority of the Court then proceeded by an attempted legal fiction to create two contracts between the parties, one contract covering the sound cattle,

which the Court held to be a valid and existing contract, and another and wholly different contract covering the diseased cattle, which the Court then proceeded to declare inexistent upon its theory that tuberculosis causes the inexistence of a contract and not the right to rescind. Having reached this conclusion, the Court remands the case with instructions to permit the plaintiffs to amend their complaint in the Trial Court in such a way as to make the action an action for money had and received based upon the inexistence of this fictitious contract for the sale of the diseased cattle.

In reaching this conclusion, the majority of the Court purported to follow a holding by the Supreme Court of Puerto Rico in its opinion, *but the Supreme Court never made any such holding* as a reading of its opinion will readily demonstrate.

The respondents had contended in the Trial Court and before the Supreme Court, and the Trial Court had held, that the entire contract was inexistent. Respondents maintained that they bought a herd of cattle and not 122 cows, that they bought one single thing and not 122 things; they maintained that the one thing which they bought (a herd of cattle) had tuberculosis and that therefore this one thing could not be the object of a sale under Section 1228 and that the contract was inexistent. They insisted that the Court had no right to inquire how many of the cows were diseased, that if a large part of the herd were diseased then the single thing which they bought was diseased. It was in disposing of this argument and for this purpose only that the Supreme Court used the expressions quoted in the majority opinion. The Supreme Court

held that what the respondents bought was 122 cows, that some of them might be well and some of them sick, and that it did not follow that the entire herd was suffering from a contagious disease because some of the individual cattle were diseased.

The Supreme Court held that the respondents brought 122 individual cattle but they certainly never held, nor could they possibly have intended to hold, that the parties made 122 separate contracts, one covering each cow, which is the meaning attributed by the Circuit Court of Appeals to Judge WOLF's opinion.

Section 1394 of the Civil Code (see Appendix A) expressly provides that where several animals are sold for a lump sum, the contract may be rescinded as to those animals suffering from a defect *but not as to the other animals.* The Code thus expressly provides for the partial rescission of a contract covering more than one animal and provides that in determining whether the animals sold were defective each animal must be considered separately. This is unquestionably what the Supreme Court had in mind as this is the result which that Court reached (see portion of Supreme Court's opinion italicized by the Circuit Court of Appeals in its opinion on page 55 of the transcript). This is not a decision that there was more than one contract, or that there was a separate contract covering each animal, as the Circuit Court of Appeals held, but a decision that the one single and only contract actually made may be partially rescinded.

The Supreme Court was following the doctrine of Sec. 1394, construed by Scaevola in the following words:

> "*Doctrine of Article 1491* (equivalent to Sec. 1394). 1st.—Case to which it applies. The case is where two or more animals (and in general two or more things) are jointly sold, whether for a lump sum or for a special price set on each of them. The Code takes no account, as a general rule, of the joint character of the sale, or even of the unity of the price, for the purposes of the warranty by the vendor. It assumes, on the contrary, that even in a single sale for a lump sum such circumstances do not imply the consolidation into a single whole of the things bought, whose individuality and singularity it aims to preserve as much as possible." (Commentaries, Vol. 23, p. 648.)

The theory adopted by the Circuit Court of Appeals is not only contrary to the authorities but it is untenable as a matter of logic. One single contract may well be rescinded in part and stand in part but it cannot be both existent and inexistent at the same time any more than a man may be alive and dead at the same time. Here the parties either made a contract or they did not make a contract. They certainly never made two contracts or 122 contracts. If there was a licit object and a consideration for the contract the parties actually made, then that contract constituted a contract under Section 1228 (*supra*). The Circuit Court of Appeals found there was a licit object and consideration and that there was a contract. To hold that that contract may be so divided up that part of it is a contract and another part of it is not a contract is to read into Section 1228 a provision that a contract may be partially inexistent where there is a partial lack of considera-

tion. There is no such principle in the Spanish law, nor, so far as we know, in any English common law jurisdiction. Where a contract is divisible by its nature, suit may be brought to cancel it in part or to rescind it in part, but such a suit in itself recognizes the existence of the contract, while the theory followed by the Circuit Court of Appeals is that the contract is in existence and at the same time that it never was in existence.

Upon this point we would quote the sound reasoning of the dissenting opinion of Mr. Justice BINGHAM, who says (Tr. p. 62):

> "My associates apparently think that, although there was an existing contract of sale to which a warranty attached and on which warranty an action must be brought, if at all, within six months after delivery of the things sold, the plaintiffs nevertheless have six years within which to sue for money had and received, as if there were 122 distinct contracts of sale in each of which there was a fixed sum agreed upon and paid for each of the cows, diseased or sound, and that an action for money had and received can be maintained for the price of the diseased ones, although there was no distinct price agreed upon for each cow. It is perfectly apparent that an action for money had and received would not lie under the circumstances here disclosed and that it should not be held to lie in this case, for it would be substituting an action for money had and received for an action for damages, which the warranty provided for, and extending the period within which suit might be brought from six months to six years."

That a contract is not inexistent, or partially inexistent, because of a partial lack or failure of consideration is demonstrated by the following quotation from Manresa, one of the leading Spanish commentators:

> "There are three legal definitions of consideration: One for each group of contracts; onerous, remuneratory and gratuitous. Simple and clear as the legal text is, it has far reaching effects; it establishes a presumption that may provide a consideration for every contract and, in this sense, it supplements Article 1277, explaining generally and *à priori* the execution in principle of all licit contracts. Such presumption *renders very difficult the allegation of absence of consideration in contracts, such as contracts of sale or exchange,* which by imposing reciprocal obligations carrying in themselves a sufficient consideration." (Italics ours.) Manresa's Commentaries, Vol. 8, page 678.

See also *Schluter* v. *Fernandez,* 30 P. R. R. 117, a suit for the purchase price of certain hams. While it appeared that some of the hams were rotten it also appeared that the purchaser had sold some of them which, therefore, had some value, and the Court allowed recovery of the entire contract price. Clearly if the contract were partially inexistent, or divisible, the Court could not have allowed recovery of the entire contract price.

At common law the rule, of course, is that any consideration is sufficient to support a contract and that a partial failure of consideration does not make the contract void or inexistent. (See 13 Corpus Juris 368 and cases there cited under note 2.)

We have found no case where a partial failure of consideration was held to make a contract void to the extent of such failure, nor any case holding that a single contract covering the sale of various different chattels for a lump sum could be divided up in such a way as to make void and inexistent part of the contract because of the partial failure of consideration. The practical impossibility of dividing the present contract is apparent from the allegation of the complaint that the 122 animals were sold for the lump sum of $18,000 and that they were "of different nature, race, gender, ages and color". The Court cannot remake the contract by supplying a price for each individual animal according to its "nature, race, gender and age" as the parties admittedly never contracted upon any such terms.

In reaching this decision that the single contract actually made may by some legal fiction be divided into several contracts, the majority of the Circuit Court Judges have gone far afield in order to provide a remedy where the Code itself has already provided not only a full and adequate but at the same time a logical remedy. Section 1394 of the Code (*supra*) was clearly drawn to cover the exact situation presented by the facts in this case. It provides that where animals are sold for a lump sum and some of them are defective, this shall cause the redhibition, or right to rescind, only as to the defective animals and not as to the sound animals. In connection with Section 1389 (*supra*) it provides that the remedy of the respondents under the circumstances shown was to choose between rescission

or demanding a proportional reduction of the price. As Scaevola says in interpreting this section:

> "Suppose ten animals, ten cows, had been bought and one of them turned out to be suffering from tuberculosis and was rejected in the slaughterhouse. The redhibition then lies of this defective animal." (Commentaries Vol. 23, p. 651.)

Whether the legislature acted wisely in providing that the remedy must be exercised within forty days from the delivery of the cattle (Sec. 1399, *supra*) is a matter not for judicial but for legislative determination.

The Supreme Court of Puerto Rico and Judge BINGHAM in his dissenting opinion followed these Code provisions as they were enacted by the legislature, and we submit that their decision is the only logical one under the facts in this case.

## POINT III.

**The Circuit Court of Appeals erred in granting to respondents permission to amend their complaint to state an action for money had and received covering the price of the diseased cattle:**

### (a) Because respondents had an adequate remedy upon the express contract.

The Circuit Court of Appeals found that there was a contract between the parties because the sound cattle were sufficient consideration to support a contract. That contract necessarily contained the warranties

provided by Sections 1389 *et seq.* of the Code (see appendix), which warranties were a part of the express contract between the parties. Under Sections 1389, 1394 and 1402 respondents could have recovered the price or value of the diseased animals in a suit upon the express contract, but such suit prescribed forty days after delivery of the cattle (Sections 1399, 1402) and had prescribed eight months before this suit was brought. The Circuit Court of Appeals would permit the respondents now to amend their complaint to set up this same cause of action under the guise of an action for money had and received, an action upon an implied contract. The action contemplated by the Code sections for breach of warranty, permitting the vendee to recover the price or value of the diseased cattle, and the action for money had and received proposed by the Circuit Court of Appeals are to all intents and purposes identical, and as aptly stated by Circuit Judge BINGHAM in his dissenting opinion (Tr. p. 62) the effect of permitting the amendment is to extend the period within which the suit might be brought to six years.

> "Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject matter; which is certainly sound law, unless the express contract has been rescinded or abandoned." *Hawkins* v. *United States*, 96 U. S. 698.

The civil law does not differ from the common law in this respect.

**(b) Because the amendment would state an entirely new and different cause of action from that stated in the original complaint and as to such proposed new cause of action the statute has run.**

The proposed amendment would state an entirely new cause of action. The complaint filed alleged that there was never any contract at all between the parties. The proposed amendment would proceed upon the theory that there were actually two contracts between the parties, and that one of them covering the sale of the tubercular cattle was inexistent, or that there was actually one contract, a part of which was existent and another part of which was inexistent at the same time. In either event the amended complaint would be directly contrary to the original allegation that there was no contract at all.

The cattle were sold and delivered on March 1, 1929. The judgment permitting the amendment was entered February 12, 1936, or almost seven years later. Even though the respondents had an action based upon the nullity of the contract, or part of the contract, that action prescribed four years after March 1, 1929.

Section 1268 of the Revised Civil Code provides:

> "Sec. 1268. The action for nullity shall last four years.
>
> "This term shall commence to run:
>
> "In cases of * * * error or deceit or falsity of consideration, from the date of the consummation of the contract."

Section 140 of the Puerto Rico Code of Civil Procedure covering the amendment of pleadings is exactly

the same as Section 473 of the California Code of Procedure, the Puerto Rico Code being taken from the Idaho Code which in turn came largely from the California Code. In conformity with the prevailing view in Code states the courts of California have repeatedly held that a complaint may not be amended to state a new or different cause of action;

*Union Lumber Co.* v. *Shouter Co.*, 25 Cal. App. 80; 142 Pac. 910;
*Altpeter* v. *Postal Tel. Cable Co.*, 26 Cal. App. 705; 148 Pac. 241;

especially where the Statute of Limitations had run against such new cause of action;

*Peiser* v. *Griffin*, 125 Cal. 9;

and that if the amendment states a new cause of action the amendment does not relate back to the beginning of the action so as to stop the running of the statute.

*Hunt* v. *Glassell*, 30 Cal. App. 676; 159 Pac. 227.

The situation in the present case is much like that disclosed by the opinion in *Warner* v. *Godfrey*, 186 U. S. 365, in which this Honorable Court reversed a judgment of the Court of Appeals of the District of Columbia which had permitted an amendment under similar circumstances.

Respondents argued before the Circuit Court of Appeals that the four year limitation provided by Section 1268 did not govern their action, upon the theory that if the contract were inexistent it would need no decree of a court to declare its nullity, and that the

only statute limiting such action would be the fifteen year statute pertaining to actions for which no specific limitation was fixed by the Code. In view, however, of the complaint filed, such position is clearly untenable. In the complaint respondents pray that the Court "enter a judgment declaring the contract null and void". They also pray for further equitable relief in that they ask the Court to decree the cancellation of the mortgages in the Registry of Property, such relief being wholly dependent upon the premise that the Court first decree the nullity of the contract. The contract consisted of obligations upon both sides, the mortgages executed and recorded being as much a part of the contract as the vendor's agreement to sell and deliver the cattle, and the fact that respondents find it necessary to ask the Court to decree the cancellation of the mortgages shows that such mortgage obligations are not "inexistent" and that an action of nullity was necessary to get rid of them.

## POINT IV.

**The decision of the Supreme Court of Puerto Rico upon matters relating wholly to the construction and application of local statutes, especially statutes of Spanish origin, will not be disturbed when such construction and application are not clearly wrong.**

*Diaz* v. *Gonzalez*, 261 U. S. 102.

## POINT V.

**The result reached by the Circuit Court of Appeals is not a just result.**

Perhaps the compelling reason in the minds of the majority of the Court for the result they reached in this case is that set out in the final words of the opinion (Tr. p. 56):

"At any rate it is the just result"

and this expression would seem to indicate that the Court itself entertained considerable doubt as to the soundness of its reasoning.

We submit that the result reached is not the just result unless we are to take the view that all Statutes of Limitation are in themselves unjust.

Respondents had their choice of two perfectly adequate remedies. They could have sued within forty days after delivery of the cattle for rescission or for damages for breach of warranty. Three of the cattle died eighteen days after delivery and six more within the next ten days, yet apparently the respondents made no effort to determine the cause of these deaths as the tuberculosis was discovered by accident by a veterinarian only in July (Tr. p. 19). Even then, when the respondents had definite knowledge of the presence of tuberculosis in the cattle, they did not bring suit but waited until December, six months later.

The Supreme Court in its opinion denying reconsideration (Appendix B) said:

> "As we pointed out in our opinion, the situation of the vendor should be considered as well as the situation of the purchaser, and such an interpretation should be put upon the law that respect the rights of both parties".

The propriety and justice of the short statute of limitations is well illustrated by the facts in this case. Three of the cattle died on March 18, just eighteen days after delivery. Two more died on March 24th, and four more on March 27th. It would seem that ordinary prudence would have induced the respondents to find out what these cattle were dying from, and to have notified the petitioner who had sold them the cattle. Yet the Trial Court found that it was only by the accidental visit of a veterinarian who went to treat a dog in July, that the respondents discovered the tuberculosis. This was over four months after the sale and delivery of the cattle. It was after this (Tr. 19) that the respondents "went to see" the petitioner and "explained the situation to him." Clearly it was impossible at that time for anyone to determine how many, if any, of the cattle had the disease at the time of the sale. Prompt action by the respondents at the time of the first deaths would have made it possible to segregate the diseased animals and avoid the spread of contagion.

As the Supreme Court says, to permit the vendee to wait or three or four years before filing suit would be unjust to the vendor, who in this case it is admitted acted in perfect good faith. The Trial Court did not

presume to find how many of the cattle had tuberculosis when they were sold. Who can say that those cattle which died in November and December already had tuberculosis when delivered on March 1st? It may well be that prompt action by the respondents to determine the cause of the first deaths would have prevented the spread of the disease and saved many of the cattle which later died. The short statute is only a fair and reasonable protection to the vendor and the requirement of prompt action on the part of the vendee is not an undue hardship. Furthermore, as the Supreme Court aptly says:

> "The idea of the Spanish Legislature, and it is our own, was *Interest Republicae ut sit finis litium.*"

## CONCLUSION.

**It is respectfully submitted that these most important questions of Spanish law and of general law have been erroneously decided by the Circuit Court of Appeals and that the decision of that Court should be reversed and the judgment of the Supreme Court of Puerto Rico reinstated.**

Respectfully submitted,

JOSE MATOS,
By GABRIEL I. LEWIS,
*His Attorney.*

OSCAR B. FRAZER,
HERIBERTO TORRES SOLA,
*Of Counsel for Petitioner.*

## APPENDIX "A".

### Revised Civil Code of Puerto Rico.

Book Fourth,—Title IV,—Chapter IV,—Article Third:—

§ 2.

*"Warranty against hidden defects of or burdens on the thing sold.*

Sec. 1387. The vendor is bound to give a warranty against hidden defects which the thing sold may have should they render it unfit for the use to which it was destined, or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and who by reason of his trade or profession should easily perceive them.

Sec. 1388. The vendor is liable to the vendee for the warranty against faults or hidden defects in the things sold, even when they should be unknown to him.

This provision shall not obtain if the contrary should have been stipulated and the vendor should not have been aware of said faults or hidden defects.

Sec. 1389. In the cases of the two preceding sections the vendee may choose between withdrawing from the contract, the expenses which he may have incurred being returned to him, or demanding a proportional

reduction of the price, according to the judgment of experts.

If the vendor knew of the faults or hidden defects in the thing sold and did not give notice thereof to the vendee, the latter shall have the same option, and furthermore, be indemnified for the losses and damages should he choose the rescission.

Sec. 1390. If the thing sold should be lost on account of hidden faults and the vendor was aware of them, he shall bear the loss, and return the price and pay the expenses of the contract, with losses and damages. If he was not aware thereof, he shall only return the price and pay the expenses of the contract which the vendee may have paid.

Sec. 1391. If the thing sold had any hidden fault at the time of the sale, and should be lost afterwards by a fortuitous event or by fault of the vendee, the latter may demand of the vendor the price he paid, deducting the value the thing had when lost.

If the vendor acted in bad faith, he must pay losses and damages to the vendee.

Sec. 1392. There shall be no liability for losses and damages in judicial sales, but all the other provisions of the preceding section shall be applied.

Sec. 1393. Actions arising from the provisions of the five preceding sections shall be extinguished after six months, counted from the delivery of the thing sold.

Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special

price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.

This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same.

Sec. 1395. The provisions of the preceding section, with regard to the sale of animals, is understood as applicable also to the sale of other things.

Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, except in the case prescribed in the following section.

Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.

Sec. 1398. If the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable for losses and damages.

Sec. 1399. The redhibitory action, based on the vices or defects of animals must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

Sec. 1400. If the animal should die within three days after being bought the vendor shall be liable, provided the disease that caused the death, in the judgment of veterinarians, existed before the contract.

Sec. 1401. If the sale has been rescinded the animal must be returned in the condition in which it was sold and delivered, the vendee being liable for any injury due to his negligence and which does not arise from the redhibitory vice or defect.

Sec. 1402. In the sale of animals and cattle with redhibitory vices the vendee shall enjoy the privilege mentioned in Section 1389; but he must make use thereof within the same period which has been respectively fixed for the exercise of the redhibitory action."

## APPENDIX "B".

**Opinion of the Supreme Court of Puerto Rico denying motion for reconsideration. (Published in the Spanish Edition of the Official Reports at 46 D. P. R. 909.)**

IN THE SUPREME COURT OF PUERTO RICO.

ALONSO HERMANOS and JOSE RAMON and MANUEL ALONSO MUÑOZ,
*Plaintiffs-Appellees,*
*vs.*
JOSE MATOS,
*Defendant-Appellant.*

5793
Appeal from the District Court of San Juan.

Opinion of the Court delivered by Mr. Justice WOLF.
(On reconsideration)

San Juan, Puerto Rico, June 8, 1934.

In writing our original opinion we never lost from view the fact that the firm of Alonso Hermanos was maintaining that a sale of animals that were affected by a contagious disease was entirely null, void and inexistent.

In part the theory of the opinion, taking the whole history of contracts for the sale of animals, was that Section 1397 of the Civil Code ought to be understood as giving a right to annul rather than making the contract absolutely void. This was the rule from time immemorial in Spain, and the intention of the Legis-

lature to change it should appear clearly. As we pointed out in our opinion the situation of the vendor should be considered as well as the situation of the purchaser, and such an interpretation should be put upon the law that would respect the rights of both parties. We also arrived at the conclusion that the somewhat inconsistent statements of the commentators did not affect our right to determine for ourselves the interpretation to be given to a section of the code which was intercalated in a chapter relating to warranty for hidden defects in animals.

Assuming, however, with the proponents of the motion for reconsideration, that the sale of the animals shown to be affected with a contagious disease was entirely inexistent, nevertheless, we think that the terms of section 1399 of the Civil Code should prevail. From time immemorial the action accruing to the purchaser of animals affected with a contagious disease was a redhibitory one. The fact, therefore, that the code perhaps made such a sale inexistent did not affect the total theory of the chapter. The essential idea of our code and of other codes was that a purchaser who had a right to annul a sale of diseased animals should begin his action within a certain limited time, in this case 40 days. It makes no difference, from our standpoint, whether the action should be styled one of nullity, or of rescision, or of inexistence, or any other action arsing in practice. As we pointed out, the time for filing a redhibitory action used to be at least six months, but the Legislature of Spain, if its theory was that the sale was entirely null and void, was seek-

ing to give the vendor some protection, and that was the possible reason why the term of 40 days was fixed. It could never have been the intention of the Spanish Legislature that a sale in good faith of diseased animals should be annullable for all time or even for the four year period which ordinarily applies to actions for nullity.

The proponents of the motion now draw our attention to the provisions of the law making a vendor of diseased animals subject to a criminal prosecution. The answer to this suggestion is that the law only covers the sale of animals knowing them to be contaminated with a contagious disease. The Puerto Rican Legislature thought that such an act was criminal and so declared, but the fact that it is declared to be criminal does not necessarily affect the rights between parties, especially where there is no bad faith. The idea of the Spanish Legislature, and it is our own, was *Interest reipublicae ut sit finis litium.*

The motion will be denied.

(s) ADOLPH G. WOLF,
Associate Justice.

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# SUPREME COURT OF THE UNITED STATES

October Term, 1936.

## No. 227

JOSE MATOS, *Petitioner*

*vs.*

ALONSO BROTHERS, *Respondent*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### PRELIMINARY STATEMENT

Respondent is a civil society with juridical entity. (People of Puerto Rico vs, Russell & Co., 288 U. S. 476).

The affirmation in the Petition (Page 3):—"It is admitted that any action for damages for breach of warranty or for the redhibition (rescission) of the contract had prescribed prior to the bringing of the action",—must be understood as not being an admission by Respondent that the action in this case is an action for damages for breach of warranty or for redhibition (rescission) of a valid contract.

The contention of Respondent, which was sustained by the majority decision of the Circuit Court of Appeals, is that the contract in question was null and void, that the action is not for rescission, but for nullity (inexistence), and that therefore it is not subject to the special limitation relating to redhibitory actions based on valid contracts.

The Penal Code of Puerto Rico in force at the time of the contract and sale declared the selling, use, and exposing of cattle with infectious or contagious disease to be a crime. (Sections 351, 352, 356 Penal Code and Act of March 14, 1907, cited in opinion of Circuit Court of Appeals, (page 56 of Record).

Justice Bingham, in his dissenting opinion held that because of these provisions of the Penal Code and of section 1238 of the Civil Code providing that things "out of the commerce of man" i. e. illicit or forbidden, can not be made the objects of commerce, there was no valid contract which could be rescinded, though he sustained the prescription of forty days applicable to redhibitory actions, which are fundamentally actions for rescission in the civil law.

## I

## The Reasons Relied upon for the Allowance of the Writ are not within those established by this Court to permit of Review by Certiorari

All questions of law presented by the Petition arise out of the interpretation and effect of a contract of sale of a herd of cows, most of which were found by the purchaser (Respondent) to be diseased, and the purchaser's remedy to relief from the vendor (Petitioner), such a contract being expressly declared by the Civil Code of Puerto Rico to be null and void. (See Section 1397 which appears on page 9 herein.)

These are not the "special and important reasons"

which must be the basis for review by certiorari by this Court of a judgment of the Circuit Court of Appeals, under Rule 38, paragraph 5 of this Court and as strictly established by its decisions.

It must be apparent to the Court that the questions of civil law which are presented involve no subtle or special learning and are really the expression of equivalent principles of American jurisprudence relating to the simple subject of sales of personal property.

The Petition fails to meet the test established by the decisions in the following leading cases:

> (2) While this power [to grant certiorari] is coextensive with all possible necessities, and sufficient to secure to this court final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy this court that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeals, or between Courts of Appeal and the courts of a State, on some matter affecting the interest of the nation, in its internal or external relations, demands such exercise."
>
> Forsyth vs. Hammond
> 166 U. S. 506
> See also Hamilton Brown Shoe Co. vs. Wolf Bros. & Co., 240 U. S. 251

> (2) "The jurisdiction to bring up cases from the Circuit Court of Appeals by certiorari was given for the two purposes of securing uniformity of decision in the circuits and of having questions of importance decided by this court when desirable in the public interest; not for the purpose of giving the defeated party another hearing".
>
> Magnum vs. Coty
> 262 U. S. 159

Referring to the Act of March 3, 1891 creating the Circuit Courts of Appeals, etc., this court in In re Woods, 143 U. S. 202, declared in its opinion (page 206):

> "But in the interest of jurisprudence and uniformity of decision..... provision was made under section 6 for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters."

The Petition fails to present reasons to meet the requirements of this Court for the exercise of its discretion as circumscribed by Rule 38.

Having in view the limitation which the court has imposed upon the exercise of its discretion in order to avoid its becoming in every case of error a second court of last-resort, we will consider the alleged reasons upon which the Petition rests as they appear therein, (Page 5, Petition) and in the Specification of Errors (page 10, Petition) relied upon in connection therewith.

Reason (a)

> "Because the prevailing opinion of the Circuit Court of Appeals has reversed the decision of the Supreme Court of Puerto Rico upon matters relating wholly to the construction and application of local statutes of Spanish origin, which construction and application were not clearly wrong". (Petition, page 5).

The above reason must be considered in connection with Specification of Errors 1 (page 10, Petition) which is to the same effect.

The foregoing reason and specification depend apriori, upon the test of their meeting the requirements of the decisions and Rule 38 of this court as to the special and important character of the questions presented, a test which is not met by the assertion alone that the

matters related to the construction and application of local statutes of Spanish origin relating simply to sales of personal property. Certiorari as an incident to appeals from Puerto Rico cannot be treated by any different standard than if the petition for certiorari were presented as an incident to an appeal from a federal district within the United States to a Circuit Court of Appeals whose decision and judgment involved the construction and application of State statutes.

In this connection we do not think it improper to observe that an excessive deference should not be made to the decisions of the courts of Puerto Rico from the mere fact that they administer the civil law, to a more or less extent.

The historical and legal facts are that at the present time the preponderating body of the law of Puerto Rico is of American origin. An examination of the decisions of the Supreme Court of Puerto Rico will disclose that in a majority of them provisions of the Civil Code and of the civil law have been determined by reference to and reliance upon decisions of American courts upon the same principles of law and subject matter of the litigation, recognized under a different nomenclature.

Up to the present time this tendency on the part of the bench and bar has had the purpose and effect of interpreting the various provisions of the civil law involved in each suit in the light of American laws and jurisprudence and to adapt the civil law thereto.

There is no fetish concerning the civil law which works against an Anglo-Saxon student.

The able lawyer "of counsel" for Petitioner, during his limited residence in Puerto Rico, acquired a mastery of the civil law which has brought him success and local fame.

The distinguished judge of the Supreme Court of Puerto Rico who wrote the opinion of the court, though

a native of the United States, has made a splendid record as student and expounder of the civil law.

In the twenty years, more or less, during which the Circuit Court of Appeals for the First Circuit has been invested with appellate jurisdiction from the Supreme Court of Puerto Rico its judges must be presumed to have qualified themselves to intelligently perform the duties imposed upon them by Congress of interpreting the civil law, as well as the laws of Puerto Rico of American origin.

There is nothing sacrosanct about the civil law which prevents an Anglo Saxon student from becoming proficient in it. He finds in its principles an equivalent in American jurisprudence and corpus juris and that the principles of the civil law are simply familiar rules of these, although expressed in a different nomenclature.

Petitioner invokes the rule established by this Court and by the Circuit Court of Appeals for the First Circuit that decisions of the courts of Puerto Rico upon matters relating wholly to the construction and application of local laws of Spanish origin should be respected, *unless such decisions are clearly wrong.* We accept this rule with the understanding that it is based, not upon the origin of the law but on the circumstance that local law in Puerto Rico relating to real estate and certain fundamental rights and obligations are matters of local regulation. Sales of personal property are not within this rule.

To this extent deference is given to local decisions, but when these are clearly wrong they are reviewed and reversed. The courts of Puerto Rico, though learned and usually correct in their interpretation and application of the civil law, are not infallible.

Reason (b)

"Because the prevailing opinion of the Circuit Court of Appeals has decided important questions

of local law in a way probably in conflict with applicable local decisions".
(page 5, Petition).

This reason is an attempt to invoke the exercise of the discretion of this Court under subdivision b of Rule". 38.

Aside from the fact that this specification of errors fails to disclose that the alleged errors involved special and important questions, not only to Petitioner but to the public of Puerto Rico and of the United States in general. Petitioner cites only one case of the Supreme Court of Puerto Rico, other than the decision in this case, to establish the alleged conflict created by the decision of the Circuit Court of Appeals complained of, whereas four American cases are cited and relied upon.

The case of Schluter vs. Fernandez, 30 P. R. R. 117, the lone case cited by Petitioner, really supports the decision of the Circuit Court of Appeals upon the question of prescription involved in an action for the recovery of the price of hams which were discovered by the purchaser after the sale to be tainted.

In the opinion of the Supreme Court of Puerto Rico in favor of Petitioner the court did not cite, much less rely upon, a single decision of its own court or of the Supreme Court of Spain in support of its reasoning upon the essentially civil, or Roman, features of redhibitory actions; while four cases from Louisiana were cited and relied upon.

The Court based its reasoning and decision only upon treatises (Comentarios) of Spanish writers on the civil law, amongst whom there are conflicting opinions upon the subject of the redhibitory action referred to in sections of the Spanish Code, the equivalents of corresponding sections of the Code of Puerto Rico, relied upon by Petitioner.

The Circuit Court of Appeals in the decision com-

plained of cited and relied upon a decision of the Supreme Court of Puerto Rico.

Viewing the reason under discussion from another angle we may, without impropriety and without offense to the courts of Puerto Rico, suggest that this Court in adopting Rule 38 and in order to carry out the spirit and purpose of the Circuit Court of Appeals Act had in mind the highest courts of the States;— not courts of unincorporated territories, when it used the terms "local law" and "local decisions".

In Downes vs. Bidwell, 182 U. S. 244 the Court in its opinion, page 259, following Scott vs. Jones, 5 How 393, and Miner's Bank vs. Iowa, 12 Howard 1, held:

> "Under the Judiciary Act permitting writs of error to the Supreme Court of a State where the validity of a *state statute* is drawn in question, an act of a territorial legislature was not within the contemplation of Congress".

Considering the difference of position and influence upon the shaping of American jurisprudence, between the highest courts of the States, which are sovereign powers, and the highest court of a territory, which is under the paramount sovereignty of the federal government ,it may not be presumed that the uniformity of decision desired and the conflict of decision sought to be avoided has relation to the decisions of territorial courts.

This suggestion may not be without relevance when there is considered the political status of Puerto Rico in relation to the United States, which relation is claimed at the present time by a considerable number of the inhabitants of the island and numerous influential members of the Congress to be indefinite and impermanent. If this be true this unincorporated territory is not embraced within the "American family" or the "American Empire" (Loughborough vs. Blake, 5 Wheaton 319, Downes vs. Bidwell, 182 U. S. 244).

Reason (c)

> "Because the prevailing opinion of the Circuit Court of Appeals has decided important questions of general law in a way probably untenable and in conflict with the weight of authority".
> (page 6, Petition).

The explanation of this reason, immediately following, and Specification 3 (page 11, Petition) fail absolutely to disclose an important question of general law in which either the public of Puerto Rico or of the United States, or the jurisprudence of either, is specially interested.

The only question involved in this case and upon which its decision depends is whether Section 1397 of the Civil Code made absolutely void the contract in question, as its plain language requires and as held in the majority opinion of the Circuit Court of Appeals, and hence not subject to an action for rescission (redhibition), or whether it made the contract voidable only, and therefore, subject to such an action.

Section 1397 is as follows:

> "Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.
>
> A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor".

Specifications of error 4 and 5 present but ordinary and routine questions of procedure of special interest to no one but Petitioner, and both depend upon the granting of the writ and the finding of substantial error upon the other questions presented.

## II

**The Circuit Court of Appeals in Reversing the Decision of the Supreme Court of Puerto Rico and in Holding that the action of Respondent (Plaintiff) was not Redhibitory and was not barred by Prescription was a sound and sane interpretation of the Civil Code of Puerto Rico and of the Civil Law.**

### ARGUMENT.

We here consider Specification of Error 2: (Page 10, Petition)

> "In reversing the decision of the Supreme Court of Puerto Rico that Plaintiff's right of action was redhibitory and was barred by prescription".

Petitioner insists now, as he did below, that the action of Respondent (Plaintiff), as determined by the complaint, is a redhibitory action subject to conditions and obligations attached to this form of action.

Soon after the establishment of civil government in Puerto Rico its Legislature enacted a Code of Civil Procedure, adopting substantially, and literally to a large extent, the Code of California, which is similar to the various codes of procedure adopted in consonance with the so called "code system".

It contains the following provisions:

> "Section 103. The complaint must contain:
>
> 1. The title of the action, the name of the court and district in which the action is brought, and the names of the parties to the action.
>
> 2. A statement of the facts constituting the cause of action, in ordinary and concise language.
>
> 3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be estated".
>
> Section 142. The court must, in every state of an

action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect".

It is admitted that of the 122 head of cattle purchased by Respondent from Petitioner 43 died of tuberculosis and 29 more were killed under orders of the Department of Health some time after the sale, March 1, 1929 and before the institution of the suit, December 12, 1929. It was natural and inevitable that the remaining fifty animals would develop the disease as a result of their contact with the rest of the herd.

Respondent's complaint was entitled "Inexistence of Contract and Cancellation of Entries".

It prayed the court to declare the nullity (inexistence) of the contract of sale and recovery of the consideration paid therefor. It was not an action for recission and redhibition.

Nullity and recission are irreconcilable.

Reference was made in the complaint to Section 1397 of the Civil Code only as the basis for declaring the contract of sale null and void.

Although the action and the complaint were simply to anull the contract of sale and to recover the consideration paid, with an offer prompted by good faith, to return the surviving cattle, they were treated and interpreted by the Supreme Court of Puerto Rico to be something else,—something which under the facts they could not legally be with due regard to the civil law.

Petioner seeks to apply to the action a prescription which does not exist, considering the circumstances of the case.

It is only by legal legerdemain that the transaction and the cause of action can be considered to be redhi-

bitory and subject to the prescription for that class of actions.

Resorting to the authority cited by the Supreme Court of Puerto Rico, the Spanish Juridical Encyclopedia of Seix, Volume XXVI, page 884, we find that redhibitory action (acción rehibitoria) is defined to be that "where a vendee demands the rescission of the contract".

Redhibition (redhibición) is defined as " the restitution of the price of a sale when, for defects of the thing sold, the contract is *rescinded*, the purchaser for this object employing the redhibitory action".

Escriche, the leading legal lexicographer of Spain, defines redhibition as follows:

> "The rescission of the sale which the purchaser may sue for obliges the vendor to restore the price and to retake possession of the thing sold, by reason of his deceit in having concealed some vice or burden which it (the thing) had:
> *Redhibitoria actis renditionem rescindit in totem, reddita revendita, et pretio recepto, rebusque omnibus restitutis in integrum*".

The essential and inseparable condition of a redhibitory action is the return by the purchaser to the vendor of the entire thing sold.

As section 1397 of the Code vitiated with nullity the Contract for diseased condition of any part of a herd or group of cattle sold, on the apparent theory that infectious or contagious disease in a part of the herd contaminated the whole herd, the effect of the section vitiated the herd as a unit.

Since the herd as sold could not, after the death and disease of a part, be returned as a unit there could not legally be performed the essential condition of a redhibitory sale and action, towit, the return of the unit (the thing sold).

The natural death and official slaughter of one part of the herd and the disease or contamination of the rest made it both practically and legally impossible for the purchaser to return all of the cattle.

Even as to the surviving cattle which had come in contact with the diseased cattle and had been exposed to infection by the latter,—Respondent was prevented by law from returning them. The offer by Respondent to do so was not made to establish the right to rescind the contract, in connection with a redhibitory action, but as a gesture of good faith in connection with his action to absolutely annul the contract.

As Section 1397 of the Code clearly made null and void the contract of sale and Respondent had a clear right to sue for the consideration paid by the single form of action required by the Code of Civil Procedure it could not be held subject to the prescription against a form of action which it never contemplated and could not institute with any hope of success.

The whole case of Petitioner resolves itself into a refinement of technicalities without the citation of authorities to show the justice of his position or to demonstrate a conflict between local cases and local law on the one side, and the decision of the Circuit Court of Appeals on the other.

## CONCLUSION

We respectfully submit that the petition should be denied because no sufficient reason has been presented to justify the court to exercise its discretion to grant the writ and because, further, no error was committed by the Circuit Court of Appeals.

San Juan, Puerto Rico, September 1936.

FRANCIS H. DEXTER,
*Counsel for Respondent.*

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Second: In holding that the herd sold was not of a unitary character, but was distributive and separable for the effects of this section of the code into individual members of the herd.

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# Supreme Court of the United States

OCTOBER TERM 1936

No. 227

JOSE MATOS,

*Petitioner,*

*vs.*

ALONSO BROTHERS, ET. AL,

*Respondents,*

## BRIEF AND ARGUMENT OF RESPONDENTS.

### PRELIMINARY STATEMENT.

Respondents Request a Complete Review of the Case.

In our brief previously presented in Opposition to the Petition for Writ of Certiorari we objected to the allowance of the writ on the ground that the reasons relied upon by Petitioner are not within those established by the rules and decisions of this court which justify the exercise of its discretional jurisdiction.

That brief was prepared in haste by undersigned counsel and as the result of some delay ocasioned by the retirement from the case subsequent to the decision of the Circuit Court of Appeals of the Honorable Martin Travieso, former Counsel for present Respondents, by reason of his appointment as one of the justices of the Supreme Court of Puerto Rico.

After adequate time has been had to study the case carefully present counsel waives and withdraws these objections which are technical in character, based on discretional jurisdiction and voluntarily, in the name of his

clients, prays the court to consider the case fully upon its merits and to review the entire case upon the record before it in order that this court may do full and complete justice to Respondents by giving them the full measure of relief to which, upon the record and ~~under~~ the law, they are entitled, and which they demanded and obtained in the insular District Court, whose judgment was reversed by the Supreme Court of Puerto Rico.

The decision and judgment of the Circuit Court of Appeals only grants partial relief and justice, by a partial reversal of the judgment of the Supreme Court.

The authority of this court to so review and to modify the judgment of the Circuit Court of Appeals so as to direct a complete reversal of the judgment of the Supreme Court of Puerto Rico is settled by statute and by the decisions of this court which will be hereinafter adverted to. There is no disputed question of fact; the proper decision and judgment in the case depends exclusively upon a single question of law.

In the Insular courts of Puerto Rico juries do not intervene in the trial of civil cases.

**The Real and Only Point of Law in Issue is Not Dependent upon a Consideration and Determination of Peculiar features of the Civil Law but Depends Alone upon the Interpretation of a Plain and Mandatory section of the Revised Civil Code of Puerto Rico of 1902 which employs Terms of General and Universal Law only, unaffected by and unrelated to any special or peculiar feature of the Civil Law.**

This is Section 1397 of that Code and is as follows:

> "Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void. A contract of sale of cattle and animals shall also be void when the use or service for which they are acquired being stated they are found to be useless therefor".

When the contract in question was executed there

were in force the following provisions of the Penal Code enacted by the Legislative Assembly of Puerto Rico at the same session of 1902 at which the Revised Civil Code was adopted and the following provisions of the Act of March 14, 1907, all supplementing the provisions of section 1397 of the Civil Code. Both of these laws were of American origin.

PENAL CODE

Section 351, (Section 5803 Revised Statutes 1911); Any person who shall knowingly sell or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed, any horse, mule or other animal having the disease known as glanders, or any other contagious or infectious disease, shall be guilty of a misdemeanor".

Secion 352, (Section 5804, Revised Statutes 1911); "Every animal having glanders or any other contagious disease shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor".

Section 356, ( Section 5808, Revised Statutes 1911) :—

"Every person who owns or has the custody of any cattle, horses, mules or asses infected with a contagious disease, and fails to immediately report the same to the insular health authorities, or conceals the existence of such disease, or attempts so to do, or wilfully obstructs or resists the said health authorities in the discharge of their duty as provided by law, or sells, gives away or uses the meat or milk or removes the skin or any part of such animal, is punishable by fine not exceeding three hundred dollars or imprisonment in jail not exceeding one year, or both in the discretion of the court".

Act of March 14, 1907.

Section 4, (Section 118 Revised Statutes 1911) :—

"Every person who knowingly sells or disposes of to another person any animal infected with or laboring under any infectious or contagious disease, or the meat, skin, hide, horns, hoofs, or any other part of an animal infected with or laboring under any infectious or contagious disease at the time of its death, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be subject to a fine of not less than one hundred dollars and not more than one thousand dollars or imprisonment in jail for not less than one month, nor more than one year, or to both such fine and imprisonment".

Section 7, (Section 121, Revised Statutes 1911) :—

"If any animal infected with or laboring under any infectious or contagious disease, or suspected of being so affected, is sold or disposed of, or is exposed or offered for sale, or is brought or attempted to be brought, for the purpose of being exposed or offered for sale in any market, fair or other open or public place where other animals are commonly exposed for sale, it shall be legal for any inspector or officer of the fair or market, or any policeman, or any local or insular health officer or inspector, to seize the animal and to report the seizure to the Supervisor of Health or to any Insular veterinary inspector, and the Supervisor of Health shall have authority, if he finds such animal to be laboring under any infectious or contagious disease, to order the destruction and disposal of said animal in accordance with the procedure provided by this act, and also to order the thorough disinfection of the premises and destruction of any pens, troughs, hay, straw or other articles which in his opinion present a danger of spreading the disease to other animals.

Section 8, (Section 122 Revised Statutes 1911):—

"The Supervisor of Health shall cause to be slaughtered all animals found to be suffering from infectious disease, or suspected of being so affected, when in his opinion it is necessary to have such animal slaughtered for the purpose of preventing the spread of the disease with which the animal is affected or suspected of being affected. No animal, however, shall be slaughtered because it is belived to be suffering from glanders or tuberculosis, or is suspected of being so infected, until the mallein test has been applied to determine the presence of glanders and the tuberculin test has been applied to determine the presence of tuberculosis and such disease is shown to be present, unless the symptoms of such diseases are plainly and visibly present".

Respondents maintain that section 1399 of the Civil Code providing a special prescription for actions for rescission of valid contracts was improperly applied by the Supreme Court to the action in question which is an action to declare illegal, —inexistent,— a contract entered into with Petitioner for the purchase of a herd of 122 cows for dairy purposes, of which herd 72 died or were condemned by the Public Health Department within a short time after the sale and prior to the suit.

Section 1399 is as follows:—

"The redhibitory action based on the vices or defects of animals must be instituted within 40 days counting from their delivery to the vendee unless, by reason of the customs in each locality longer or shorter periods are established. This action in the sale of animals may only be enforced with regard to the vices and defects of the same determined by law or by local customs".

It can not, and will not be denied that this prescription is applicable and limited to redhibitory or rescissory

actions to rescind and recover damages for the breach of legal warranty of *valid* contracts for the sale of animals having *vices* or defects.

Such vices or defects are of a character affecting only the private use of the animals by the purchaser. They are not the vital conditions prohibited by section 1397 to be the object of a contract for protection of the public welfare and as public policy.

The claim of Petitioner as well as the decision of the Supreme Court of Puerto Rico which was only partially reversed by the Circuit Court of Appeals is based on the argument that the word "void" in sec. 1397 should be read as "voidable", and that the words "shall not be the object of a contract of sale" should be read as "may be the object of a contract of sale at the option of the vendee".

This argument is insisted upon because this section of the Revised Code of Puerto Rico of 1902 which was carried over and adopted from the first Civil Code of Spain of 1889 was placed by the Spanish codifiers in an inapposite and disparate position in a subdivision of the Code relating to redhibitory contracts validly executed and to actions for their rescission, notwithstanding that the Supreme Court and Petitioner admit that considered alone and removed from such association the section would be given effect as applying to contracts absolutely illegal in their inception and execution because lacking a valid or licit object and consideration and prohibited by law for the public welfare.

The Civil Code of Puerto Rico of 1902 was a codification and re-enactment, to a considerable extent substantially, —but not entirely,— of the Spanish Civil Code of 1889.

Sections 1397 and 1399 were precise re-enactments of the similar articles in the Spanish Code.

However, the Legislative Assembly of Puerto Rico made numerous modifications of and additions to various subjects. The most striking additions and modifications were made in the "Preliminary Title. The Laws, Their Effects, and the General Rules For Their Application". ion".

These additions and modifications which will be more specifically referred to hereinafter responded to the purpose of the legislature to inaugurate a policy of adaptation of the laws of Puerto Rico and of their interpretation to the principles of American jurisprudence.

## Precise Statement of Our Position.

If the plain purpose and effect of Section 1397, which we claim is to declare illegal and remove from commerce and human use for the welfare of the public and in pursuit of a humanitarian and scientifically based public policy, cattle suffering from tuberculosis, are to be disregarded and if the section shall be interpreted in such manner that its efficacy and enforcement are left dependent upon the selfish individual interest of the parties in the exercise by them of an election, for their benefit alone, to rescind then the contract and action in question are of a redhibitory character and the decision and judgment of the Supreme Court of Puerto Rico should be sustained.

If however, effect shall be given to the section according to its plain language and purpose, in the interests of the public, then the contract for a herd of cows purchased for the purpose of a dairy of which a majority developed tuberculosis, must be declared absolutely illegal, and it is not subject to the special forty days prescription applicable to redhibitory, or rescissory contracts and actions.

Not only does the section by its terms nullify as a matter of law the sale of one or more animals, or of a herd, infected with contagious disease but the natural effect of the existence of the disease in a greater part of a herd is to outlaw the entire herd, as a matter of practical experience and of human welfare.

All the surviving members of the herd become contraband, "hot" cattle,—out of the commerce of man.

Section 1238 of the Revised Code of Puerto Rico provides:

All things, even future ones, which are not out of the commerce of man, may be objects of contracts.

The Decision of the Supreme Court was Clearly Wrong in its Interpretation of Section 1397 of the Civil Code which consists only of a statement of General and Universal Law Terms.

There has not been a single case decided previously either by the Supreme Court of Puerto Rico or the Supreme Court of Spain,—hence none could be cited,—to serve as a precedent to sustain the decision.

The only precedent directly in point is a previous decision of the Supreme Court of Puerto Rico. which the court ignored, rendered by the same judge who rendered the present decision, but which is directly contrary to it. This case will be more specifically referred to hereinafter. (Page 15 herein).

The Supreme Court of Puerto Rico relied for judicial precedent exclusively on American state cases, demonstrating clearly that the vital question of interpretation involved was not a matter peculiar to the civil law.

It based its decision upon the commentaries of Scaevola, which are palpably contradictory and fallacious. This point will be fully discussed in Point C.

## Summary of Proceedings in the Courts Below.

District Court of San Juan.

The complaint filed. December 12, 1929 by *Alonso Brothers* vs. *José Matos* is entitled "Inexistence of Contract and Cancellation of Entries" (page 1, Transcript of Record). It alleges the purchase by plaintiffs from defendant March 1, 1929 of a herd of cattle composed of 122 head for the lump sum of $18,000, of which sum $3,000, were paid in cash on the day of the contract, by the transfer from the Alonso Brothers to Matos of a town property valued at $5,000, and by the execution of a mortgage by the Alonso Brothers to Matos on town property to secure the sum of $10,000 payable two years after date.

The complaint alleged that from the 18th of March 1929 to the 6th of December 1929, 43 of the cows died of tuberculosis, a contagious disease contracted prior to the sale, and that after a tuberculine test by the Health De-

partment of Puerto Rico, 29 more head were condemned prior to the suit.

Plaintiffs tendered to defendant the surviving cows of the herd at the institution of the suit.

Plaintiffs prayed the recovery of the cash payment of $3,000, and the sum of $5,000, value of the property transferred to defendant, together with the annulment of the mortage executed to secure the sum of $10,000 and the cancellation thereof in the Registry of Property.

Defendant after submitting a demurrer (Page 8, Transcript) invoking the redhibitory prescription of 40 days provided in Section 1399, which was denied, filed his answer. (Page 11, Transcript).

The answer admitted the execution of the contract and the receipt of the consideration as alleged. It admitted the death and condemnation of the cattle as alleged but set up that the tuberculosis was acquired after the sale, due to improper care by plaintiffs.

The answer renewed the defense of prescription of 40 days.

The judge made an ocular view of the surviving cattle on the premises where they were kept (page 15 Transcript) at the request of the parties.

January 12, 1931 the District Court rendered its judgment (page 23 Transcript) in favor of plaintiffs declaring null and void the contract of sale, ordering the return to plaintiffs of the sum of $3,000, the cash paid, plus value of town property transferred, and annulling the mortgage to secure the sum of $10,000, together with its inscription in the Registry of Property.

This judgment was based upon the facts found by the court set forth in "Statement of Facts and Opinion". (Page 17, Transcript).

By the terms of the judgment this statement was made a part thereof.

Following are the material findings of fact and conclusions of law (page 19, Transcript) :-

"It is well to analyze, before going ahead, and in a summary manner, the evidence adduced herein. The

evidence for the plaintiff reveals substantially that the purchase of the cattle was made on March 1, 1929.... ....that the cattle were to be used for dairy purposes .... that the cattle began to die on the 18th of March; that in July, Varas, a veterinary surgeon came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it; that the cows were purchased for the purpose of a dairy.... There is no doubt that the animals which were the object of this suit died of a contagious disease such as is pulmonary tuberculosis (page 20, Transcript). It is a settled fact that the appearance of the animal does not necessarily reveal its condition of health, in other words that a cow may be apparently sound and produce milk normally and nevertheless be suffering from tuberculosis.... the evidence supports the allegations of the complaint, namely that at the time of the transaction, part of the cattle sold was suffering from a contagious disease".

In its conclusions of law the court found that the contract in question was illegal and void (page 21 Transcript) and that the action was not subject to the redhibitory prescription of 40 days as claimed by defendant.

The conclusion of the court on this last point where it appears at the bottom of page 21 of the Transcript is erroneously set forth due to an error of translation which has been corrected by a certificate from the Secretary-Reporter of the Supreme Court of Puerto Rico from which it clearly appears that the court in its opinion rendered in the Spanish language held that the action is not a redhibitory one.

## Decision of the Supreme Court of Puerto Rico

The Supreme Court of Puerto Rico accepted the findings of fact of the District Court. Adopting these facts

and findings and considering that the contract in question was embraced within those prohibited by Section 1397 of the Civil Code it decided that the contract was not illegal, or absolutely void, but that it was voidable at the election and for the benefit of the purchaser and that its legal effect and the remedy for the violation of the section are governed by the provisions of the Civil Code relating to redhibitory contracts and actions, including the special prescription of 40 days.

The court found that the contract for the herd of cows was "individual" or "distributive",—not unitary,—: that as to the cows that had died or were condemned the right to recover the purchase price therefor was prescribed by the redhibitory prescription; and that as to the cows surviving at the institution of the suit plaintiffs never had a right of action to recover the purchase price.

## Decision of the Circuit Court of Appeals.

The court accepted the facts as found by the District Court and approved by the Supreme Court of Puerto Rico. In the decision of the majority the contract in question was held to be illegal, —inexistent,— as to the cows that died or were condemned as a result of tuberculosis, that the contract and action embraced in Section 1397 of the Civil Code are not redhibitory, and that the prescription of 40 days with reference to redhibitory actions does not apply. On this ground the judgment of the Supreme Court was reversed and respondents (appellants) were permitted to amend their complaint which prayed for the recovery of the price of the entire herd so as to sue only for the cows that had died or were condemned before the institution of the suit.

However, with reference to the cows surviving at that time the court adopted the decision of the Supreme Court as to the interpretation of the section that effect could not be given to it in support of the claim of Respondents as to the unitary character of the herd.

In the dissenting opinion of Justice Bingham he rejected the interpretation of the Supreme Court of Puerto Rico

to the effect that in all cases Section 1397 of the Code established a voidable or redhibitory contract, holding that contracts in certain cases covered by this section must be held to be illegal and inexistent, but that in the present case the Supreme Court of Puerto Rico did not err in holding the action in question to be of a redhibitory character and entirely barred by the redhibitory prescription.

## PROPOSITION I

THE DECISION OF THE SUPREME COURT OF PUERTO RICO WAS CLEARLY WRONG:

FIRST: IN DISREGARDING THE PLAIN AND MANDATORY PROVISIONS OF SECTION 1397 OF THE CIVIL CODE WHICH SECTION CONTAINS ONLY ORDINARY WORDS OF CURRENT USE IN GENERAL AND UNIVERSAL LAW, FREE FROM ANY ASSOCIATION OR CONNECTION WITH ANY SPECIAL FEATURE OF THE CIVIL LAW, AND IN SUBSTITUTING, CONTRARY TO THE EXPRESS PROVISIONS OF THE CODE RELATING TO ITS INTERPRETATION, A RESCINDIBLE OR RESCISSORY CONTRACT FOR ONE THAT THE LEGISLATURE DECLARED TO BE ILLEGAL, INEXISTENT.

SECOND: IN HOLDING THAT THE HERD SOLD WAS NOT OF A UNITARY CHARACTER, BUT WAS DISTRIBUTIVE AND SEPARABLE FOR THE EFFECTS OF THIS SECTION OF THE COOE INTO INDIVIDUAL MEMBERS OF THE HERD.

THIRD: IN APPLYING UPON THESE ERRONEOUS PREMISES THE REDHIBITORY PRESCRIPTION OF 40 DAYS TO THE ACTION.

The Supreme Court in holding that the contract and action in question are redhibitory with reference to the entire herd, and the Circuit Court of Appeals in adopting its decision with respect to the divisible character of the herd as to the cows surviving at the time of the suit failed to give effect to Section 1397 as a statute enacted for public policy and public welfare.

This section of the Civil Code should have been considered by the Supreme Court in connection with the provisions of the Penal Code and of the Revised Statutes, hereinbefore set forth, on the same subject in force at the time of the execution of the contract.

The Supreme Court violated the standards for Interpretation of the laws of Puerto Rico established in and by the Revised Civil Code.

In the "Preliminary Title, the Laws, their Effects and the General Rules for their Application", were enacted the following sections which it was the duty of the Supreme Court to consider and apply in connection with Section 1397 and the other laws relating to the sale of cattle with contagious diseases;

> "Section 4. Acts executed contrary to the provisions of law are void except when the law preserves their validity. Rights granted by the laws may be renounced, provided such renunciation be not contrary to law, to public interest or public order, or prejudicial to the interest of a third person".

> "Section 13. (new). When a law is clear and free from all ambiguity the letter of the same shall not be disregarded, under the pretext of fulfilling the spirit thereof".

> "Section 19. (new). When, in order to prevent fraud or from other motives of public utility, the law declares certain acts void, its provisions shall not be dispensed with or left unperformed on the ground that the particular act in question has been proved not to be fraudulent or contrary to the public good".

The words "public utility" as employed in this section are generally understood to refer to "public policy".

> "Section 1248. If the terms of a contract are clear and leave no doubt as to the intentions of the

contracting parties the literal sense of its stipulations shall be observed".

Decisions of the Supreme Court of Puerto Rico.

"The province of the court in the construction of a statute is simply to ascertain and declare what is in terms and substance contained therein and not to insert what has been omitted or to omit what has been inserted". *People* vs. *González,* 20 P. R. R. 553.

"The words used in a law are unmistakeable and, however inconsistent they may seem, it is not for the court to substitute its will for that of the legislature". *Julbe* vs. *Guzman,* 16 P. R. R. 502. Opinion by Justice Wolf who wrote the opinion in present case.

"The public policy of a state or nation should be determined by its constitution, its statutes, and its jurisprudence, and not by different opinions of laymen, attorneys, or judges in regard to the requirements and interests of the public". *Matos* vs. *Siaca,* 21 P. R. R. 400".

Spanish Doctrine

The Spanish Juridical Encyclopedia by Seix in its Vol. 19, page 820 states amongst the rules of interpretation for the codes and laws of Spain the following:

4. It is not permitted to make distinctions when the law does not distinguish nor can exceptions be made which the law does not contain.

5. The application of the law should take place in that order of things for which it has been established; objects of a different order or class can not be decided by it.

7. When the law, for fear of some fraud, declares certain acts null, its disposition can not be eluded on

the theory that such acts have been proved not to be fraudulent.

Decisions of the Supreme Court of the United States.

"No change in the meaning of the Judiciary Act of August 12, 1888 was intended or wrought by the rearrangement of its parts in the Judicial Code".
*Gen. Investment Co.* vs. *Lake Shore RR. Co.*, 260 U. S. 261.

"The title of an act can not be resorted to in aid of its construction when the act is free from doubt or ambiguity"
*Cornell* vs. *Coyne*, 192 U. S. 418.

"We are not at liberty to construe language so plain as to need no construction".
*Helvering* vs. *City Bank Farmer's Trust Co.*, 296 U. S. 85. 89.

"The ordinary rules of interpretation of the statute are applicable to the Louisiana Code".
*Viterbo* vs. *Friedlander*, 120 U. S. 707.

The case of *Tillman* vs. *Tillman* (So. Carolina) 26 L. R. A. (N. S.) 781 is peculiarly in point as to the effect of improperly placing by the codifiers Section 1397 amongst inapposite and disparate sections.

"The place assigned to a statute in a compilation can not control its plain meaning as expressed by its terms".

The Only other Decision of the Supreme Court of Puerto Rico directly in Point is Contrary to the Decision in this Case.

That case is *Booth Packing Co.* vs. *Sobrino* Bros., 34 Puerto Rico Reports 14, decided March 6, 1925.

The court based its decision in that case on Section

1238 of the Civil Code which declares void all contracts concerning things or objects, "out of the commerce of man", which is the same section upon which the Circuit Court of Appeals relied in this case in construing Section 1397.

The prescription invoked in that case and held not to apply was that stated in Articles 342 of the Code of Commerce. This section is as follows:-

> "A purchaser who has not made any claim based on the inherent defects in the article sold within the thirty days following its delivery, shall lose all rights of action against the vendor for such defects".

The court held that this prescription could only have effect with reference to a valid contract and that as the contract in question was absolutely null and void because it lacked a licit "object" and, therefore was without consideration, it did not apply.

The Supreme Court sustained this defense made by the purchaser in a suit brought by the vendor to recover the price of a consignment of canned fruits, of which a great part turned out after delivery to be spoiled and unfit for human consumption.

The court in that decision also declared as inapplicable the case of *Schluter* vs. *Fernández,* 30 P. R. R. 117, which was relied upon in that case and which is cited by Petitioner in this case as the only case in the Supreme Court of Puerto Rico to defeat the present action.

The Justice who wrote the opinion in the Booth case is the same who wrote the opinion in this case. The attorney for the defeated party in that case was the same able attorney of counsel in this case.

The prescription of 30 days provided in the article of the Code of Commerce above cited is in pursuance of principles of the civil law relating to redhibitory contracts and actions.

This appears from the decision of the Supreme Court in the present case (botton of page 34 Transcript) where the court quotes the Spanish Juridical Encyclopedia relating to the Civil law on the subject or redhibition.

"Our private law has substantially adopted the redhibitory action when authorizing the rescission of contracts of sale by reason of defects in the thing sold, under the general Civil Law as well as under the special Commercial law etc."

The vital question at issue in this case to wit,—the illegality, inexistence,—of the contract in question and its non prescription in 40 days was conclusively established by the Supreme Court in a previous decision from which we quote the syllabi:-

2. There is no contract without the concurrence of the three requisites specified in Section 1228 of the Civil Code.

4. The difference between void and voidable contracts is that in the former there is no contract by reason of the lack of one or more of the essential requisites, and in the latter that as the essential requisites are present there is a contract but it is affected by a defect which may invalidate it.

6. When a contract is void there can be no prescription of an action for its rescission because there is no starting point for computing the time for prescription.

*González* vs. *Fumero,* 38 P. R. R. 497.

## POINT A.

The decision of the Supreme Court of Puerto Rico violated the Public Policy of the unorganized Territory of Puerto Rico Created by Act of Congress, such public policy being that which is general law throughout the United States.

Many changes were made in the laws of Puerto Rico subsequent to the change of sovereignty and prior to the execution of the contract in question in pursuance of the purpose to adapt the legislative and judicial policy of Puerto Rico to American standards.

The new sections of the Preliminary Title to the Civil Code with respect to its interpretation, heretofore cited, were introduced by the Legislative Assembly in its revision of 1902 in response to the inauguration of this policy. They were the result, in part, of the labors and report of the Commission appointed by the President under section 40 of the first Organic Act of April 12, 1900:—

> ...."to compile and revise the laws of Puerto Rico, also the various codes of procedure and systems of municipal government now in force, and to frame and report such legislation as may be necessary to make a simple, harmonious and economical government, establish justice and secure its prompt and efficient administration, inaugurate a general system of education and public instruction, provide buildings and funds there for, equalize and simplify taxes and all the methods or raising revenue, *and make all other provisions that may be necessary to secure and extend the benefits of a republican form of government to all the inhabitants of Porto Rico.*" (Italics ours.)

In its report to the President, the Commission submitting its suggestions for revision stated,—"it was undoubtedly the purpose of Congress to bring the institutions of the island into clearer harmony with the American system", although it recommended that changes should be made gradually.

It is beyond the realm of discussion that the change of sovereignty and the subsequent action of Congress brought the island under the aegis of the Constitution of the United States in so far as legislation affecting the rights of life, persons and property of its inhabitants are concerned and also brought it and its inhabitants under the influence and inspiration of the legal institutions and public policy of the United States.

> "In construing the Organic Act of a Territory this court will consider that Congress intended to create a government conforming to the American system". *People of Porto Rico* vs. *Rosaly,* 227 U. S. 270.

The principle announced in the above case must be held to apply not only to the interpretation of the Organic Act itself but also to the interpretation of the powers and their manner of execution conferred upon the territory.

We wish to be understood that we do not claim that the policy of adaptation was meant to apply immediately to laws relating to property rights, successions, domestic relations, or to any other subject intimately associated with the previous traditions of the inhabitants but rather to the adaptation of those principles which contain the general public policy of the United States and of the States with reference to public health, morals and police power.

The provisions of the Penal Code which was adopted at the same session of the Legislative Assembly at which the Revised Civil Code was adopted and the provisions of the Act of March 14 1907 making criminal the sale and possession of cattle suffering from contagious diseases were certainly enacted in response to this policy. In view thereof the co-related Section 1397 of the Civil Code must be interpreted in the light of that policy, particularly under the mandates of interpretation for the laws of Puerto Rico established by the Legislative Assembly.

"Federal courts are not bound by the decisions of state or local courts in matters of general law".

*Carpenter* vs. *Providence, Washington Ins. Co.,* 16 Peters 495,

*Washburn & Moen Mfg. Co.* vs. *Reliance Marine Ins. Co.,* 179 U. S. 1;

*Mutual Life Ins. Co. of N. Y.* vs. *Johnson,* 293 U. S. 335.

"The Judiciary Act declaring local law rules of decisions in federal courts is limited in its application to laws strictly local and to the construction thereof adopted by local tribunals and to rights and titles to things having permanent locality; it does not extend

to contracts and other instruments of commercial nature"
*Swift* vs. *Tyson,* 16 Peters 1;
*Brooklyn City RR. Co.* vs. *Nat. Bank Rep.* 102 U. S. 14;
*Watson* vs. *Tarpley,* 18 Howard 517.

"A decision of the Supreme Court of Puerto Rico on a question of local law is entitled to great weight, but is not conclusive, and is reviewable, especially where it is based on a consideration of the general law."
*Successors of Fantauzzi* vs. *Municipal Assembly* of Arroyo, 295 Fed. 803 (CCA, 1st Circuit).

## POINT B.

If the interpretation of Section 1397 involves a question of General Law then the decision of the Supreme Court of Puerto Rico Disregarded the Public Policy of both the United States and the Territory of Puerto Rico;

"In the federal courts whether a contract is against public policy is a question of general law not dependent on any local statute or usage. While the decision of the local courts are entitled to the weight of persuasive authority, federal courts will exercise their own judgment".
*Liverpool etc. Steam Co.* vs. *Phenix Ins. Co.,* 129 U. S. 397;
*Bucher* vs. *Cheshire RR. Co.,* 125 U. S. 555,
*Smith* vs. *Alabama,* 124 U. S. 465.

"The public policy of the government is to be found in its statutes and when they have not directly spoken then in the decisions of the courts and the constant practice of the government officials; but when the law making power speaks upon a particular subject, over which it has constitutional power to legislate public policy in such case is what the statute enacts".
*United States* vs. *Trans- Missouri Freight Association,* 166 U. S. 290, at bottom of page 340 of Opinion.

"If the law prohibits any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the cauntry on that subject". *United States* vs. *Trans-Missouri Freight Association,* ibid, at bottom on page 340 and top of 341 Opinion.

"A contract which contemplates the violation of a statute is void whether the act is malum in se or only malum prohibitum".
*United States* vs. *Owens,* 2 Peters 527; Opinion at p. 539.

"There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal". Ibid, Opinion page 539.
*Gibbs* vs. *Consolidated Gas Co.,* 130 U. S. 396.

"An act done in violation of a statutory provision is void and confers no right upon the wrong doer".
*Ewert* vs. *Blue Jacket,* 259 U. S. 129;
*Burch* vs. *Taylor,* 152 U. S. 632;
*Miller* vs. *Ammon,* 145 U. S. 421.

"In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption, for the law looks to the general tendency, and the vice is in the very nature of the contract itself".
*Mc Mullen* vs. *Hoffman,* 174 U. S. 639.

"The legislature itself could not directly, or by authority to the courts, limit or abrogate the police power which is inherent and vested in it by the local constitution".
*Northern Pacific RR. C.* vs. *Minn.,* 208 U. S. 583;
*Chicago B. & Q. RR. Co.* vs. *Mc Guire,* 219 U. S. 549.

"Every part of the consideration of a contract goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise fails".
*Hazelton* vs. *Sheckells,* 202 U. S. 71, Opinion at page 78.

## POINT C.

The Decision of the Supreme Court of Puerto Rico was clearly Wrong in its Reliance upon the fallacious Commentary of Scaevola in Disregard of the Statutory Laws of Puerto Rico.

Without being able to refer to or rely upon a single precedent of its own court or the Supreme Court of Spain in support of its conclusion the Supreme Court in its decision that the contract in question was voidable, or rescissory, was controlled by a commentary of Scaevola notwithstanding that other equally eminent Spanish, French and Italian Commentators of the civil law sustain the theory of absolute illegality,—inexistence,—and the non prescription of the same.

The court in its Opinion (page 30 Transcript) confesses:

"Some of the commentators on the Civil Code apparently say, especially when discussing the question of prescription, that section 1397 makes the contract absolutely inexistent, implying therefore, that no prescription runs", citing
10 Manresa (4th Ed) 229;
24 Laurent 109,
1 Gasca 357.

The comentaries of these eminent authorities are set forth later in this brief.

We will first quote from the opinion of the Supreme Court and its reference from Scaevola in support of the conclusion reached by it. We shall follow by submitting

quotations from the same Scaevola in his commentaries upon the same identical article of the Spanish Civil Code corresponding with section 1397 of the Code of Puerto Rico and upon other articles of the Code, which commentaries are in complete contradiction with the commentary which the Supreme Court selected to rely upon in its decision.

Let us first consider one of the commentaries of Scaevola in this connection, quoted by the Supreme Court, which will serve to destroy his authority in support of the commentary next to be referred to in which he converted the words and terms of the codifiers of the Code into the opposite of their plain intent and effect, and which controlled the court.

Referring to the defective codification in connection with the adoption of the section of the Spanish Code corresponding to Section 1397 of the Code of Puerto Rico and in connection with its disparate collocation amongst sections relating to redhibitory contracts and actions Scaevola as quoted by the court (Page 39 Transcript) says:-

> "This subject of the sale of animals has been brought into the Code in fragments, which form a veritable juridical crazy quilt made up of all sorts of materials and hues. The contrast exhibited by the provisions as against each other is as striking as it is queer; the deficiencies noted as numerous as they are regrettable".

"Notwithstanding this, Supreme Court quoted from Scaevola (page 30 Transcript); the decisive and controlling Commentary:

> "We prefer, therefore, to think that "Homer slept"; that nothing else was intended than to apply specifically to the sale of animals or cattle what was already provided for all kinds of alienations in general; that, in so doing an uncalled for repetition was incurred; *and that, as it generally happens in such cases, in saying what was not needed it was ended by saying what*

> *should not have been said* Let it be understood, then, that when the contract we are discussing is declared to be void it has been intended to characterize it as "voidable" (rescindible) subject to a redhibitory action as in the case of any other contract where the thing sold lacks fitness". (Italics ours).

The Supreme Court characterizes this comment as "poignant". We agree with the characterization within the true meaning of the word.

As the result of these commentaries the court declared and decided:- (Page 31 of Transcript) :-

> "We, therefore, come to the conclusion with Scaevola that necessarily *the legislator meant to say that the contract could be rescinded or annulled as in other redhibitory actions,* and that section 1397 does not exclude the transaction made in this case from the field of warranties". (Italics ours).

We can understand how Scaevola could usurp and substitute in their functions the codifiers of the Code and the Parliament (Cortes) of Spain In view of the system under which he lived and worked, but the conditions under which the Supreme Court of Puerto Rico functions with respect to its interpretation of the laws are vastly different.

In this connection there should be considered section 11 of the Revised Civil Code of Puerto Rico in relation to its declaration of the policy of Puerto Rico.

> "Section 11. The forms and solemnities of contracts, laws and other public instruments are governed by the laws of the country in which they are executed. . . . . Notwithstanding the provisions of this and the preceding section, prohibitory laws relating to persons, their acts or property, and those which relate to public order and to good morals shall not be held invalid by reason of laws, decisions, regulations or agreements in force in any foreign country".

The Court should also have considered section 19 of the Revised Code of Puerto Rico (page 13 supra).

## POINT D.

Other Commentaries of Scaevola to the same Section of the Civil Code which is in question, and to other Sections not cited by the Court, are in absolute Contradiction to the commentary Relied upon by it and establish the Absolute Illegality of the Contract in Question and its Non-Prescription.

In the same voluminous commentaries made by Scaevola to Article 1494 of the Spanish Civil Code (Section 1397 Revised Code of Puerto Rico), appears the following declaration in which he affirms that the contracts referred to in that section are absolutely illegal,—inexistent, Hence, we insist, they can not be subject to the prescription of 40 days for redhibitory contracts as he erroneously concluded. Volume 23, page 665.

> *"Illegality of the sale of animals infected with contagious diseases.* The Public Administration is constantly dictating dispositions tending to avoid contagion amongst cattle and more especially the contagion which may be caused to persons from their food products. This matter being one of public policy, foreign legislatures from which has been imported Article 1494 not only prohibit and punish the traffic in such cattle but declare that they are not susceptible of being the object of a contract of sale.
>
> *" Thus said article also establishes, as if that were not sufficient by riveting the nail and disposing that all contracts made with respect to animals and cattle suffering from contagious diseases shall be illegal.* (Italics ours.)

From the moment that the Code casts out these animals from the field of free contract, not only is the illegality which it condemns fixed according to law but

it is an inevitable consequence of that premise. Where there is no licit object there can be no valid contract.

In the field of theory it may be discussed if the precautions of the legislator should go so far as to compare animals infected with contagious disease with impossible things, to those which do not exist, and to those which are not susceptible of ownership which things are thouse which are removed from the supreme right of man to contract. All the more may this be discussed when there is taken into consideration the general extension of the precept within which it even results impossible to purchase animals infected with contagious diseases to be destroyed or to be utilized as fertilizer.

*But the law with its due penalty is not limited in its declarations; what is contrary to law can not be the object of contract, and what can not be the object of a contract irremediably causes the illegality of the same.*" (Italics ours).

With this frank and positive admission of the illegality, — inexistence — of a contract made in violation of section 1397,—which illegality or inexistence removes it from the redhibitory prescription—Scaevola with [redacted] astonishing inconsistency and fallacy, in the other part of his commentary to the section in question, relied upon by the Supreme Court, reached the conclusion that the contract and action under such section are redhibitory and subject to the prescription of such actions. This conclusion is deduced though Scaevola and the Supreme Court of Puerto Rico declare in other general opinions that contracts which are illegal, —inexistent,— are not subject to prescription. In the case of González vs. Fumero, hereinbefore cited at page 17 of this brief, the Supreme Court of Puerto Rico decided:—

"When a contract is void there can be no prescription of an action for its rescission because there is no starting point for computing the time for prescription".

If the inconsistency and fallacy of Scaevola has not already been satisfactorily demonstrated we submit the commentary made by him to Article 1479 of the Spanish Code,—the equivalent of Section 1382 of the Revised Code of Puerto Rico, which we refer to only for the purpose of comparison.

This section is found in both codes in connection with the provisions of the civil law with respect to remedies based on the legal warranty for loss or damage to property sold and purchased under a valid contract.

Article 1479 of the Spanish Code (section 1382 Revised Code of Puerto Rico) provides:-

> "Should the vendee lose, on account of the eviction, a part of the thing sold of such importance in relation to the whole that he would not have purchased it without said part, he may demand the rescission of the contract; but with the obligation to return the thing without other charges than those it had when he acquired it. The same provision shall be observed when two or more things should be jointly sold for a lump sum, or a special price for each one of them, should it clearly appear that the vendee would not have purchased one without the other".

Commenting upon the above article Scaevola says: (Vol. 23, page 580) :-

> "In conclusion it is most clear that when the purchaser elects to rescind, article 1299 which fixes the period for four years to petition for the same shall apply".

Section 1299 of the Spanish Code is the equivalent of section 1266 of the Revised Code of Puerto Rico and provides:

"The action asking rescission must be brought within four years".

The attention of the court will again be called to section 1382 in connection with our insistent claim that the illeg-

ality of the contract in question extended to the entire herd, which is the subject of a special point hereinafter presented in this brief. (Subtitle H., page 34).

The first subdivision of the subject in the Revised Code of Puerto Rico and to which section 1382 is related, is entitled "Warranty in Case of Eviction" and comprises sections 1378 to 1386.

The second subdivision of this title follows immediately thereafter and is entitled "Warranty against Hidden Defects of or Burdens on the Things Sold".

This subdivision is a branch of the general law of warranty and applies to the so called "redhibitory" contracts and actions.

The word "eviction" as used in civil law with reference to remedies for breach of warranty is defined by the Code:

> Section 1378. "Eviction shall take place when by final judgment and by virtue of a right prior to the sale, the vendee is deprived of the whole or a part of the thing purchased. The vendor shall be liable for the eviction even though no stipulation has been included in the contract on the subject.
> The contracting parties may, however, increase, decrease, or suppress this legal obligation of the vendor".

The contracts of sale protected by these provisions of the code relating to warranty in case of eviction (breach) are contracts validly executed in accordance with the law.

## POINT E.

Contrary Opinion of Other Equally Eminent Commentators of the Spanish Civil Code to Scaevola's commentary to section 1397, (Revised Code of Puerto Rico.)

Manresa, one of the leading commentators of the Spanish Civil Code, in his commentary on Article 1494—the equivalent of section 1397 of the Revised Code of Puerto Rico, (Vol. 10, page 250) says:

> "It is easy to observe that what the Code does by this provision (Art. 1494) is not to determine the respon-

sibility of warranty, but to declare an illicit object of contract, basing itself upon very powerful reasons of public policy. This premise being settled, the consequence which followed was not certainly the responsibility of warranty; the logical consequence is the one deduced by the Code, the declaration of nullity, because if contracts are null when one of the essential requisites is lacking, and one of the requisites which must necessarily concur is the legality of the object, when the object is declared illicit, the nullity of the onctract is a necessary consequence".

"The contract of sale of cattle and animals,—continues the second paragraph of the article—shall also be null, when after expressing therein the service or use for which they are acquired, they should prove to be useless for such service or use. We repeat, with reference to this precept, what we have just said; it is not that the responsibility of the seller to perfect the warranty arises in such case; it is that the law declares the contract null".

Another leading authority on the Civil Code of Spain, Martínez Ruiz, in his commentaries, "The Civil Code Interpreted by the Supreme Court", Vol. 9, page 361, says:-

"As much may be said of the sales made at public auction, in which the period of time which must necessarily elapse between the notice of sale and the holding of the auction during which the objects of the sale may be examined with greater care constitutes without doubt a security against mistakes in favor of the purchaser. In these cases, as in the sales of discarded horses, when the latter or the cattle are suffering from contagious diseases, the sale is null and void because it covers things which the laws of sanitation and public hygiene decree that they be considered as illicit objects of commerce. This declaration of nullity is justified because the licit object of the contract is lacking".

The foregoing comment refers to Article 1493 of the Spanish Code, the equivalent of section 1396 of the Revised Code of Puerto Rico.

It disposes of the argument made by Pecitioner on pages 15 and 17 of his brief concerning the supposed inference erroneously drawn from this section in favor of the supposed redhibitory character of the contracts prohibited by section 1397.

Laurent, the eminent French commentator of the Code Napoleon, interpreting provisions of that code similar to those contained in Section 1397 of the Civil Code of Puerto Rico says:-

> "It appears from the Penal Code (Articles 319-321 and from the Decree of the Council of June 26, 1784, that it is forbidden for any one to sell or offer for sale at the fairs and markets or at any other place, horses or beasts suffering or suspected of suffering from contagious diseases. The absolute prohibition to sell places the said animals outside of commerce; consequently, the sale is null. It is not necessary to consider whether the seller acted in good faith or not; the sale is null for want of an object and it might even be held that it is inexistent. *It is not necessary either, to inquire whether the disease constitutes a vice justifying rescission, because it is not by reason of a vice that the sale is null, but for the reason that the thing is outside of the commerce*". (Italics ours).
>
> Laurent, "Principles of Civil Law", Vol. 24, pp. 109, 110

The Italian commentator Gasca commenting on a provision of the Italian Code similar to section 1397 of the Code of Puerto Rico says:-

> "The sale is void when the subject-matter thereof, which coincides with its object, is contrary to law or public order. (Article 1122 of the Civil Code).
>
> "It is void because, the things alienated being outside the commerce of man, the vendor would act fraudulent-

ly in selling them; also because the sale can not be valid when it constitutes a crime or a violation of law.

*"In my opinion the judgments which regard the infectious or contagious disease of an animal as a redhibitory vice are defective and wrong.* Undoubtedly the absolute nullity of the contract of sale in such cases should not be declared except after it has been proved that the germ of the disease antedated the contract, since the animal could have contracted the disease after the sale. But once such proof is established, whether the vendor acted in good or bad faith, *the sale should not be avoided only by reason of the exercise of the redhibitory action, but it should be adjudged null and void for lack of the thing which according to law may be the object of the sale".* Page 357. (Italics ours).

## POINT F.

The decision of the Supreme Court in its Interpretation of Section 1397 is Clearly Wrong because it is in Absolute Conflict with and in Violation of other Plain sections of the Civil Code which are declaratory of general law relating to the illegality of contracts, and which are Unaffected by Special Features Peculiar to the civil law.

"Section 1222. (Revised Code of Puerto Rico.) The contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention or law, morals, or public order", [public policy].

Scaevola in commenting upon this article in the Spanish Civil Code (Art. 1255) says:-

"Definitely, agreements in contravention of public policy are to be under stood to be those which are prohibited by law, whether properly and strictly and in their entirety relating to the public right, or whether relating to private right, but affecting certain precepts of social interest". (Vol. 20, page 505).

"Agreements prohibited by law and in contravention of good customs have no force whatsoever. The article speaks of law, without adding any qualifying adjective from which it results that the exception extends to all. Thus, nothing can be stipulated in violation of a law whether this be substantive or adjective,—of administrative, civil or penal character (Vol. 20 pag. 474).

Section 1228. Revised Code of Puerto Rico (Art. 1261. Spanish Code).
"There is no contract unless the following requisites exist: (1) consent of contracting parties; (2) a definite object which may be the subject of the contract; (3) the cause [consideration] for the obligation which may be established".

This principle of the civil law declares the general law of the United States relating to the essential elements of contracts.

Under the general title of the Code relating to "Contracts in General" and in the subdivision relating to "The Object", (subject matter) of contracts the Code declares;

Section 1238. "All things, even future ones, which are not out of the commerce of man, may be objects of contracts..... All services not contrary to good morals may also be the object of a contract".

Under the general title of the code relating to contracts in general and under the subdivision relating to "Consideration" (cause) the Code provides:—

Section 1242. "Contracts without consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals".

Scaevola in commenting upon the similar article, 1275, in the Spanish Code, declares:—

"The illicit character of the consideration produces its absolute inefficacy; and the consideration is

illicit when it is contrary to the laws or good, morals". (Vol. 20, page 774).

"Every part of the consideration of a contract goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise fails".
*Hazelton* vs. *Sheckells,* 202 U. S. 71, Opinion at page 78.

## POINT G.

The Decision of the Supreme Court of Puerto Rico was Clearly Wrong in Not Sustaining the Absolute Illegality,—Inexistence,—of the Entire Contract in Question, thus Violating the Provisions of the Civil Code Relating to Nullity of Contracts,—which are Declaratory of the General Law.

Section 1267. "Contracts containing the requisites mentioned in section 1228 may be annulled even when there should be no lesion to the contracting parties, whenever they contain any of the defects which invalidate them according to law".

Section 1268. "The action for nullity shall last four years".

Scaevola in his commentary to section 1267 (Art. 1300 Spanish Code), Vol. 20, page 955, says:—

"Void contracts.....are those which have no existence,—those which have a vice in their origin which illegally affects their inherent efficacy;
rescindible or inefficacious contracts are those which are valid in principle in accordance with the law as to their manner of conception and formalization, and encounter an obstacle which prohibits their performance".

(Page 959) "Let us first classify contracts as existing or non-existing according as they contain or not the

three requisite essentials, of consent, object and consideration. If they do not contain these..... if a definite object was lacking, or if its vitality was not due to a definite consideration, the contract does not exist. In such cases there is no contract, as stated in article 1261; and it is therefore, the case of inherent and fundamental nullity".

Article 1261 of the Spanish Code referred to is the same as section 1228 of the Revised Code of Puerto Rico. (See page 32 herein).

Section 1270. "When the nullity of an obligation has been declared, the contracting parties shall restore to each other the things which have been the object of the contract with their fruits, and the value with its interest, without prejudice to the provisions contained in the following sections".

## POINT H.

The Decision of the Supreme Court was Clearly Wrong in Not Sustaining the Illegality of the Contract in question since the sale of the Diseased Cattle constituted a Crime which vitiated the Entire Contract.

Section 1272. (Revised Code). "When the nullity arises from the illegality of the consideration or of the object of the contract, if the fact constitutes a crime or misdemeanor, common to both contracting parties, they shall have no action against each other, and proceedings shall be instituted against them, and, furthermore, the things or sum which may have been the object of the contract shall be applied as prescribed in the Penal Code with regard to the goods or instruments of the crime or misdemeanor. This provision is applicable to the case in which there is a crime or misdemeanor on the part of only one of the contracting parties, but the one which is not guilty may recover what he may have given, and shall not be bound to fulfill what he may have promised".

Respondents Respectfully insist that the decision of the Supreme Court violated the second paragraph of the preceding section, which is declaratory of general law.

Scaevola in commenting on this article in the Spanish Civil Code, and those associated with it in the Chapter relating to "nullity" of contracts, says (Vol. 20, pages 995, 996) :—

> "What is, above all, the true and inherent effect of nullity? To annul a contract is to declare that it could not have been executed; or that the parties to it lack capacity; or because the consent to the contract was not voluntarily given; or because the stipulations were contrary to the law or good morals.
> Thus, nullity resolves itself into inexistence; the void contract which simulated factual existence, for greater or less time, never had it juridically".....
>
> Pag. 996. "A void contract is one which has never existed juridically; one which was born, as a fact, but without conditions of life. The first and principal consequence, amongst others of the nullity is, therefore, that the things revert to the condition and state they had when the contract was executed, etc."

## POINT I.

The Decision of the Supreme Court was clearly wrong in holding that the contract was valid as to the Members of the herd surviving at the time of the suit, in disregard of the unitary character of the herd resulting from the purpose and effect of section 1397 of the Civil Code and the Provisions of the Penal Code and of the Revised Statutes. In following to this extent the decision of the Supreme Court the Circuit Court of Appeals was inconsistent, having already held the contract to be illegal. Thus it erred and failed to do complete justice to Respondents.

Section 1397 of the Code as translated into English related to "animals and *cattle*". The word "animals" refers to one or more beasts of a different species, from

milch cows and beef cattle; whereas the word "cattle" refers to a herd of milch cows or beef cattle. The addition of the word "cattle" (ganado) to the word "animals", [redacted], included as a separate legal object a compact or unitary herd of the species of milch cows or beef cattle.

In the Spanish text the words employed are:—

No serán objeto del contrato de venta los ganados y animales que padezcan enfermedades contagiosas, etc."—"Animals *and cattle* suffering from contagious diseases shall not be the object of a contract of sale". (Italics ours).

Escriche, the universally accepted lexicographer of Spanish legal terms and phrases, defines "ganado" to be a "herd, or group (*conjunto*) of tame beasts of a species that grazes or gathers together".

The Spanish word "conjunto" is defined in Appleton's Spanish-English Dictionary as "the whole, aggregate, entirety, ensemble".

The Spanish Juridical Encyclopedia of Seix, Vol. 27, page29 defines the word "ganado" in the same language as Escriche. Appleton's Spanish-English Dictionary defines the word "ganado" as follows; "livestock", cattle herd, flock, drove". As a matter of ordinary definition in the lexicographical sense it is apparent from the most ilustrious Spanish lexicographers and the most authoritative American lexicographers of Spanish-English definition, that the word "ganado" in the Spanish text and "cattle" in the English text are used to refer to a herd of milch cows or beef cattle as distinguished from individual animals of different species.

The distinction intended and accomplished in the use of the words "animals" and "cattle" is even more pronunced in section 1399 relating to the redhibitory prescription.

In this section this prescription only applies to "vices and defects of *animals*", without using the word "cattle" (ganado).

This shows the design of the codifiers of the Spanish Civil Code in framing the original article (Article 1496) to not include therein "cattle" (ganado), milch cows or beef cattle used for human food.

This species was exempt from the prescription because of the fear or danger that the contagious disease of milch cows and beef cattle would be included amongst the "vices or defects" of other species of animals, and thus subject to the rescissory or redhibitory option of the parties.

The Supreme Court in its decision (bottom page 40, top, page 41, Transcript) said:—

> "If the court below and the appellees were right that the whole sale as an entirety was annullable because of contagious disease in a majority of the animals then, of course, the complaint was good".
>
> "We have the idea that when cattle are sold, even for a dairy, the animals are sold individually. It is a distributive sale. It makes no difference that the sale was for a lump sum".

Again, (bottom of page 30 Transcript) :-

> "Let us take an example particularily germane to this case. A sale of a cow is made and both parties are acting in good faith. Nevertheless, after a while either by his own observations or the intervention of the health authorities the buyer learns that the cow has incipient tuberculosis. However, the cow is exceptionally good and the purchaser desires to retain it. Under all the authorities he could not retain the cow and get back the price. To recover the price he must return the animal. It is entirely at his election to retain the cow.
>
> No different rule could apply where cattle are sold in bulk.

The Supreme court completely changed the purpose and effect of section 1397 of the Code and the provisions of the Penal Code and of the Revised Statutes which made

contraband and illegal the retention and possession of either individual cows or a herd of cows in which tuberculosis has developed. The court said the buyer could retain the tuberculosis cow, implying the legality of its use for milk or food. The Penal Code and the Act of March 1907 make criminal such possession and use.

Even by comparison with the redhibitory contract, which the Supreme Court insisted the one in question is, the court was clearly wrong in view of section 1394 of the Revised Code relating to redhibitory transactions. This section is as follows:—

> "If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the others, *unless it appears that the vendee would not have purchased the sound one or ones without the defective animal.* This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same". (Italics ours).

Scaevola in commenting on the article of the Spanish Code equivalent to the above section of the Revised Code of Puerto Rico (Vol. 23, page 648 says:-

> "It being recognized from the foregoing that the various things object of the contract constitute in this case one single thing for the purpose of the responsibility of the vendor, it would not be violent, but natural and judicious,—in treating of article 1484 relating to occult defects which deteriorate the thing totally or in a principal part,—to hold it applicable to the case of the sale in bulk of various things, they being considered then one single thing of which the defective or sick would be a part.

For comparison only, at and the risk of tedious repetition, we again refer to section 1382 of the Revised Code of

Puerto Rico relating to redhibitory transactions to demonstrate the error of the Supreme Court with reference to the so called distributive, or individual character of the herd;

> Section 1382. "Should the vendee lose, on account of the eviction, a part of the thing sold of *such importance in relation to the whole, that he would not have purchased it without said part,* he may demand the rescission of the contract; but with the obligation to return the thing without other charges than those it had when he acquired it. The same provision shall be observed when two or more things should be jointly sold for a lump sum, or a special price for each one of them, should it clearly appear that the vendee would not have purchased one without the other". (Italics ours).

Scaevola in commenting upon the equivalent article in the Spanish Civil Code of the above section (Vol. 23 page 580) says:—

> "To this effect, it is so truly common sense, that the return of the thing by the purchaser in the case of rescinding the contract refers alone to the part remaining after the loss,, that no one can doubt it although there is no express provision of the code in this sense".

Can it be reasonably doubted that the members of the herd that were lost,—forty nine by death and twenty nine by condemnation.—were "of such importance in relation to the whole" that Respondents would not have purchased the whole without them, considering that the herd was purchased for dairy purposes and considering the price paid?

If the privilege is accorded to the purchaser under a valid redhibitory contract to rescind and recover the purchase price under the conditions stated in the above section the right is much more imperative in the case of an illegal

contract, for the purchase of a herd of cows suffering from a contagious disease, the possession and use of which constitute a crime.

The District Court found the following facts (page 21 Transcript);-

> "The evidence itself gives us the key, the cows were to be used for a dairy, that is for the business of milk production. This was the same business to which the defendant has been using them *and it can not be imagined that the plaintiffs paid the sum of money they paid for the* 122 *cows, if they were not going to use the cows in the same business.* (Italics ours).

Leaving aside the pecuniary loss of Respondents in the present case, the consequences of sanctioning upon the theory of redhibition the sale of the infected cattle under the conditions of fact found by the District Court would be to legalise the detestable use of the cows and their products by concealment of their actual or probable infection, to the prejudice of the health and lives of the community.

If this were done without the judicial sanction implied by the decision of the Supreme Court it would be difficult to adequately condemn such conduct.

The necessity of legally treating as a unit a herd of cows purchased for dairy purposes when even one or a few may be subject to tuberculosis is a matter of common knowledge and experience of which the courts take judicial notice.

We submit the following excerpt from an article by Alexander E. Wight, Chief, Tuberculosis Eradiction Division, Bureau of Animal Industry, United States Department of Agriculture, published as an official document by that Department, "Farmer's Bulletin", No. 1069, issued November 1919, revised to January 1936.

### How Cattle Become Infected

> "The tuberculous cow is the greatest source of danger to healthy cattle. Inasmuch as it cannot be determin-

ed just when that animal becomes a "spreader" of the germs unless daily microscopic tests are made of the milk and of the discharges from the body, it is unsafe to keep her with healthy cattle. No cattle from outside sources should be introduced into a healthy herd until they have been tuberculin-tested and found free from the disease. Unquestionably more healthy cattle acquire tuberculosis by coming in contact with affected animals than in any other way".

## II

## WITH REFERENCE TO THE PROPER PRESCRIPTION, APPLICABLE TO THE PRESENT ACTION RESPONDENTS BELIEVE THAT NEITHER THE PRESCRIPTION FOR REDHIBITORY ACTIONS NOR THAT FOR NULLITY SHOULD APPLY.

We have seen in the case of *González* vs. *Fumero* (supra), that when a contract is void there can be no prescription of an action for its nullity because there is no starting point for computing the time for prescription.

Though we have seen in the case of *González* vs. *Fumero* (supra), that when a contract is void there can be no prescription of an action for its nullity because there is no starting point for computing the time for prescription. This is the ordinary rule.

Counsel for Respondents however, does not take the view that because the Legislature of Puerto Rico failed to attach to or provide for a violation of Section 1397 of the Code a prescriptive period that prescription never begins to run.

We frankly confess that such omission should not permit a person who becomes the victim of the void and inexisting contract covered in Section 1397 to unreasonably defer, or neglect, to bring his action to recover the price paid. This would be an intolerable situation, not sanctioned by law or equity.

Manresa, says:—(Vol. 10, page 256)

"Is the period of prescription fixed by Section 1496

> [Section 1399 Rev. Code of P. R.] applicable in the case of paragraph second of Section 1494 [Sec. 1397 Rev. Code of P. R.], that is, when the sale is one of animals which have resulted useless for the use or service for which they were required? It may not be so affirmed, because Section 1494 speaks of nullity and not of warranty against hidden vices. Shall the period of four years fixed by Section 1301 [Sec. 1268 Rev. Civ. Code of P. R.] for actions of nullity, be applied to the case? It is not possible either to affirm it because in the case of the sale of animals the granting of such period is absurd. There exists really an omission as to this particular point".

We believe that in this case the provisions of the new paragraph to Section 7 in the Revised Code of Puerto Rico should apply.

> "When there is no statute applicable to the case at issue, the court shall decide in accordance with equity which means that natural justice, as embodied in the general principles of jurisprudence and in accepted and established usages and customs, shall be taken into consideration."

The question would be governed therefore, under the equitable doctrine of laches, requiring the injured party to bring his suit within a reasonable time after he became aware of the existence of the contagious disease in the animals purchased.

This was the view taken by the District Court, (page 22, Transcript, bottom of page);

> "The injured party must claim the inexistence of the contract with reasonable diligence, as soon as he has knowledge of the occult defect or of the cause that makes the contract *inoperative*. And that is what the plaintiffs herein have done". (Italics ours).

In the printed Transcript of the record in this court the translation of the Spanish word "ineficaz" appears erroneously as "voidable". In the corrected translation by the Secretary Reporter of the Supreme Court of Puer-

to Rico, permission to file which has been requested of this court, the word is properly translated "inoperative" as appears above.

As to Tender to Petitioner of the Cows Surviving at the time the suit was brought and which was rejected by him.

Respondents respectfully submit that as they complied with the requirements of law and equity, as declared in the Civil Code, in tendering to Petitioner the surviving cows upon the institution of the suit, and at a reasonable time, if they are no longer available to make the tender effective the loss must fall upon Petitioner whose acts are responsible for his present situation, in pursuance of the rule that the loss must fall upon the party or person responsible for a wrong committed upon an innocent party.

## III

## THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED BY ALLOWING RESPONDENTS TO RECOVER THE PRICE PAID FOR THE ENTIRE HERD AND TO DIRECT A REVERSAL OF THE ENTIRE JUDGMENT OF THE SUPREME COURT OF PUERTO RICO.

Under the circumstances of the case which involve simply a question of law, there being no disputed question of fact, this court has the power to modify the judgment of the Circuit Court of Appeals as prayed by Respondents.

*Panama RR.* vs. *Napier Shipping Co.*, 166 U. S. 280,
*Cole* vs. *Ralph*, 252 U. S. 286,
*Delk* vs. *St. Louis & S. F. RR. Co.*, 220 U. S. 580.

We copy section 701 of the Revised Statutes of the United States as enacted because it is erroneously presented and printed in the United States Code, Title 28, Section 876:

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order, of a Circuit Court or District Court acting as a Circuit Court, or of a Dis-

trict Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require, The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon".

The section is correctly cited in *Realty Co.* vs. *Montgomery*, 284 U. S. 547, 550 (1931).

By the Act of June 30, 1926 relating to the codification of the permanent laws of the United States it was provided in Section 2, Subdivision (a) thereof that the matter set forth in the United States Code shall establish prima facie such laws of the United States but that "nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments".

Petitioner has presented the whole case and requests a complete reviewthereof. We unite with him but for a contrary purpose.

## CONCLUSION

Respondents respectfully pray that the judgment of the Circuit Court of Appeals for the First Circuit be modified so as to order and direct the complete reversal of the judgment of the Supreme Court of Puerto Rico, with costs to Respondents.

San Juan, Puerto Rico,
February, 1937.

FRANCIS H. DEXTER,
Counsel for Respondents.

SUPREME COURT OF THE

October Term 1956

No. 271

JOSE MATOS

v.

ALONSO BROTHERS, ET AL.

PETITION OF RESPONDENTS FOR

# Supreme Court of the United States

October Term 1936
No. 227

JOSE MATOS
*Petitioner,*

*vs.*

ALONSO BROTHERS, ET. AL.,
*Respondents.*

## PETITION OF RESPONDENTS FOR REHEARING

Francis H. Dexter,
*Counsel of Respondents.*

# In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. 227

*JOSE MATOS*

*Petitioner,*

*vs.*

*ALONSO BROTHERS, ET. AL.,*

*Respondents.*

## PETITION OF RESPONDENTS FOR A REHEARING.

Respondents, by their undersigned counsel pray for a rehearing of the decision and judgment in the above entitled cause rendered, March 29, 1937, and for grounds of this petition they respectfully submit as follows:

The decision of the Court, omitting the part which narrates the proceedings in the lower courts, disposed of the case in the following terms:

> "Two sections of the Revised Civil Code of Puerto Rico follow.
>
> 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void. A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.
>
> 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless,

by reason of the customs in each locality, longer or shorter periods are established. This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

Several sections of the Island's Penal Code interdict sale or possession of animals suffering from a contagious disease..."

.....

"The matter is here by certiorari. Manifestly the solution of the controversy must turn upon the meaning and effect of the above quoted sections of the Civil Code—local law of Puerto Rico—.

Considering the argument here, the divergent views below, the authorities cited, and "recognizing the deference due to the understanding of local courts upon matters of purely local concern", it becomes impossible for us to entertain "a sense of clear error committed" by the Supreme Court. Following the view so often approved, we think the Circuit Court of Appeals should have accepted and affirmed the ruling there announced after much consideration.

(Nadal Vs. May, 233 U. S. 447,454; De Villanueva Vs. Villanueva, 239 U. S. 293,299; Diaz, et al. Vs. Gonzalez, et. al., 261 U. S. 102,105.

The judgment of the Circuit Court of Appeals must be reversed; the judgment of the Supreme Court is affirmed."

## I

## THE DECISION OF THE SUPREME COURT OF PUERTO RICO IN THE PRESENT CASE DOES NOT REPRESENT THE SETTLED LAW OR DECISIONS IN PUERTO RICO ON THE POINT IN QUESTION.

The only other decision of that Court on the point in question is directly in conflict with the decision in the present case and the former decision supports the absolute illegality of the contract in question and its freedom from the redhibitory prescription.

The case of Booth Packing Co. v. Sobrino Brothers, 34 P. R. R. 14, decided, March 6, 1935, decision by Justice Woolf, based its decision on Section 1238 of the Revised Civil Code of Puerto Rico and on Article 342 of the Code of Commerce.

Section 1238 of the Civil Code, provides as follows:

> "All things, even future ones, which are not out of the commerce of man, may be objects of contracts...."

Article 342 of the Code of Commerce in force at that time provided as follows:

> "A purchaser who has not made any claim based on the inherent defects in the article sold, within thirty days following its delivery, shall lose all rights of action against the vendor for such defects."

The Court held that this redhibitory prescription only could have effect in reference to a valid contract and that as the contract in question was absolutely null and void because lacking a licit "object" it was without consideration and therefore the redhibitory prescription did not apply.

This was a suit to recover the purchase price of a consignment of canned fruits.

The Supreme Court sustained the objection of the defendant purchaser to the claim of the plaintif vendor of the redhibitory prescription of 30 days as against the defense of defendant purchaser that a great part of the consignment of canned fruits had turned out after delivery to be spoiled, and held inapplicable the case of Schluter vs. Fernandez, 30 P. R. R. 117, which was relied upon in that case and which is cited by the petitioner in this case as the only case in the Supreme Court in Puerto Rico to defeat the present action.

The prescription of 30 days provided in the Article of the Code of Commerce, above cited, is in correlation with that of the civil law relating to redhibitory contracts and

actions, as provided in Section 1399, Revised Civil Code 1902.

This appears from the decision of the Supreme Court in the present case (bottom of Page 34 Transcript) where the court quotes the Spanish Juridical Encyclopedia relating to the civil law on the subject of redhibition:

> "Our private law has substantially adopted the redhibitory action when authorizing the rescission of contracts of sale by reason of defects in the things sold, under the general civil law, as well as under the special commercial law, etc."

No "rule of property" or action with reference to the interpretation of Section 1397 of the Revised Civil Code has been established in Puerto Rico.

## PREVIOUS DECISIONS OF THIS COURT APPLICABLE TO THE POINT UNDER CONSIDERATION.

In the case of Edward Hines Trustees Vs. Martin, 268 U. S. 458, in a unanimous decision of this Court, expressed thru Justice Stone, the Court declared:

> (Page 463) "When questions affected by the interpretation of a state statute or a local rule of property arise in a Federal Court, that court has the same authority and duty to decide them as it has to decide any other questions which arise in a cause; and where state decisions are in conflict, or do not clearly establish what the local law is, the Federal court may exercise an independent judgment and determine the law of the case. See Pease Vs. Peck, 18 Howard, 595,598; Burgess Vs. Seligman, 107 U. S. 20; Barber Vs. Pittsburg Railway Co., 166 U. S. 83,89; Kuhn Vs. Fairmont Coal Co., 215 U. S. 349.
>
> This Court has refused to follow a..... single decision when not satisfied that it is conclusive evidence of the State law, Barber Vs. Pittsburg Railway Co. 166 U. S. 83,89."

In Risty v. Chicago, Rock Island & Pacific Railway Co., 270 U. S. 378, the court in a unanimous decision expressed thru Justice Stone declared:

> "It is the duty of Federal courts, in suits brought in or removed to the district courts, to decide for themselves all relevant questions of state law, including the meaning of state statutes *where they have not been clearly and decisively passed upon the State court.* (Italics are ours).

In Concordia Insurance Co. Vs. School District, 282 U. S. 545, the Court in a unanimous decision expresed thru Justice Sutherland declared:

> "A Federal court is free to construe a state statute where the decisions of the highest courts of the State are in conflict or where there is no authoritative decision in conflict with the general law."

In Stanley County Vs. Coler, 190 U. S. 437, the Court in a unanimous decision declared:

> "While as a general rule Federal courts will accept the interpretation put by the courts of a State upon its own constitution or statutes, yet where the law has not been definitely settled, it is the right and the duty of Federal courts to exercise their own judgement."

In Kuhn Vs. Fairmont Coal Co., 215 U. S. 349 it is decided:

> "Rules or law relating to real estate, so established by State decisions rendered before the rights of the parties accrued, as to have become rules of property and action, are accepted by the Federal courts; but where the law has not thus been settled it is the right and the duty of the Federal Court to exercise its own judgement, as it always does in cases depending on doctrines of commercial law and general jurisprudence."

## II

SECTION 128 OF THE JUDICIAL CODE, AS AMENDED FEBRUARY 13 1925, (SECTION 225, TITLE 28, UNITED STATES CODE) GIVES TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT APPELLATE JURISDICTION TO REVIEW FINAL DECISIONS OF THE SUPREME COURT OF PUERTO RICO IN CIVIL CASES:—

"FOURTH,.....IN ALL OTHER CIVIL CASES (OTHER THAN THOSE INVOLVING FEDERAL QUESTIONS) WHEREIN THE VALUE IN CONTROVERSY, EXCLUSIVE OF INTEREST AND COSTS EXCEEDS $5000."

In adopting the foregoing provision the Congress was aware of the previous decisions of this Court applying the doctrine of "local decisions" to the judgments and decisions of the Supreme Court of Puerto Rico.

Instead of recognizing and adopting this doctrine the Congress established a different rule, as it had the power to do with reference to the judgments and decisions of the Supreme Court of Puerto Rico, a possession or dependency under the sovereignty and control of the National government, it provided a *review* "in all civil cases" wherein the value in controversy exceeds $5,000.

This law applies not only to the United States Circuit Court of Appeals for the First Circuit as to the full and complete scope of its review but also to this Court in cases from the former entertained upon certiorari.

If this were not the intention and effect of the law the appellate jurisdiction of the United States Circuit Court of Appeals to review the decisions and judgments of the Supreme Court of Puerto Rico in civil cases would be futile and empty.

The same intention and effect do not follow from the provision contained in clause First of the section relating to appeals from the district courts of the United States.

"All cases" in this clause refer to the limited class of cases over which the district courts have jurisdiction,

original or by removal. Congress could not, with due regard to the comity existing between the federal courts and the highest courts of the States, if not to the Constitution, apply the same rule of review to the latter on local questions which it has the undoubted power to do with reference to the courts of a possession or dependency.

This question is not affected by the power which Congress may or may not have to authorize a complete and full review of the judgments and decisions of the Supreme Court of the organized Territory of Hawaii.

## III

### THE INTERPRETATION OF SECTION 1397 OF THE REVISED CIVIL CODE OF PUERTO RICO OF 1902 AND OF THE PROVISIONS OF THE PENAL CODE AND OF THE REVISED STATUTES MAKING ILLEGAL CONTRACTS FOR THE SALE OF CATTLE SUFFERING FROM CONTAGIOUS DISEASES ADOPTED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO AFTER THE ISLAND HAD PASSED AS A POSSESSION OR DEPENDENCY OF THE UNITED STATES UNDER ITS SOVEREIGNTY AND CONTROL INVOLVES A QUESTION OF THE GENERAL PUBLIC POLICY OF PUERTO RICO WITH REFERENCE TO SUCH LEGISLATION—WHICH PUBLIC POLICY IS THE SAME AS THAT OF THE NATIONAL GOVERNMENT AND WHICH WAS ADOPTED BY THE LEGISLATIVE ASSEMBLY—THUS BEING A QUESTION OF GENERAL LAW.

The interpretation of Section 1397 of the Revised Civil Code and of the provisions of the Penal Code and of the Revised Statues above referred to should not be considered to be a question of local law in which the National government and the Federal appellate courts with jurisdiction have no legal interest or responsibility.

This section and the other provisions above referred to were adopted by the Legislative Assembly of Puerto Rico under the standards of interpretation prescribed in the

"Preliminary Title" of the Revised Civil Code of 1902 which adopted the standards of interpretation which are a part of the jurisprudence of the United States, and under the influence of the public policy of the Nation.

See Respondent's Brief submitted on Hearing and Argument, pages 13 and 14, and section 11 of the Civil Code of 1902, cited at bottom of page 24 of the brief.

The interpretation of Section 1399 of the Revised Civil Code relating to redhibitory prescription is not in question. It is conceded that this section establishes the redhibitory prescription applicable to rescissory contracts. This rescissory prescription can not be applied to the contracts and actions embraced within Section 1397 upon giving it the effect demanded by the plain provisions of the Section, towit:—the illegal contract is prohibited in the interest of public health and public welfare.

We respectfully suggest that the present case should be governed by the doctrine established by the unanimous decision of the Court, expressed thru Chief Justice Taft in the case of Yu Cong Eng, et al. Vs. Trinidad, Collector, 271 U. S. 500. That case decided:

> 5. The duty of a court to construe an act of legislation in harmony with the fundamental law, does not authorize the court to depart from the plain terms and intention of statutes, and thus in effect to make a new law.
>
> 8. On a question of the construction of the Phillippine Code of Procedure adopted by the United States Philippine Commission, the Court in reviewing the decision of the Supreme Court of the Philippines may exercise its independent judgment.
>
> 9. The application of American constitutional limitations to a Philippine statute dealing with the rights of persons living under the government established there by the United States, is not a local one.....

10. The limitations in the Philippine Bill of Rights are to be enforced in the light of the construction by this Court of such limitations as recognized by it since the foundation of our government.

In its opinion, Page 522 the Court declared:

"The suggestion has been made in argument that we should accept the construction put upon a statute of the Philippine Islands by their Supreme Court as we would the construction of a state court in passing upon the federal constitutionality of a state statute. The Philippines are within the exclusive jurisdiction of the United States Government, with complete power of legislation in Congress over them, and when the interpretation of a Philippine statute comes before us for review, we may if there be need therefor re-examine it for ourselves as the court of last resort on such a question. It is very true that with respect to questions turning on questions of local law, or those properly affected by custom inherited from the centuries of Spanish control, we defer much to the judgment of the Philippine or Porto Rican courts. Cami v. Central Victoria Ltd., 268 U. S. 469; Diaz v. Gonzalez, 261 U. S. 102. But on questions of statutory construction, as of the Philippine Code of Procedure adopted by the United States Philippine Commission, this Court may exercise an independent judgment. In Philippine Sugar Co. v. Philippine Islands, 247 U. S. 385, involving the effect of Section 285 of that Code, the court said, at Page 390: "It is also urged that, since the construction of Section 285 is a matter of purely local concern, we should not disturb the decision of the Supreme Court of the Philippine Islands. This court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute. Phoenix R. Co. Vs. Landis, 231 U. S. 578. But that disposition may not be yielded to where the lower court has clearly erred. Carrington v. United States, 208 U. S. 1."

The question of applying American constitutional limitations to a Philippine or Porto Rican statute dealing with the rights of persons living under the government established by the United States, is not a local one....."

The case of Philippine Sugar Co. v. Philippine Islands, 247 U. S. 385 above cited was a unanimous decision expressed by Justice Brandeis.

In the opinion of Chief Justice Taft in the case above cited the court decided:

"The fundamental law we administer in the Philippine bill of rights was a marked change from that which prevailed in the Islands before we took them over and is to be enforced in the light of the construction by this court of such limitations as it has recognized them since the foundation of our own government."

The fundamental law in force in Puerto Rico includes the public policy of the United States. The public policy of Puerto Rico and its laws are subject to and interpreted by the public policy of the United States.

Swift v. Tyson, 16 Peters 1.

"The 34th Section of the Judiciary Act of 1789, which declares "That the laws of the several states, except where the Constitution, treaties, or statutes of the United States, shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply", has uniformly been supposed by the Supreme Court to be limited in its application to State laws strictly local; that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.

The section does not extend to contracts or other instruments of a commercial nature, the true interpretation and effect thereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines or commercial jurisprudence."

In the case of the Baltimore and Ohio Railroad Co. vs. Baugh, 149 U. S. 368, the court in its opinion in referring to the case of Swift v. Tyson, declared:

(Page 372) "Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. Forty years thereafter, in Burgess v. Selingman, 107 U. S. 20, the matter was again fully considered, and it was said by Mr. Justice Bradley, on pages 33, and 34, that "the Federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws.... but where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence..... As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of diferent states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

(Page 373) "Whatever differences of opinion may have been expressed, have not been on the question whether a matter of general law should be settled by

the independent judgment of this court, rather than upon an adherence to the decision of the State courts, but upon the other question, whether a given matter is one of local or of general law."

The public policy, or "institutional law" of the United States is as much a part of our national system as is the Constitution.

"No contract can be enforced in the courts of the United States, no matter where made or where to be executed, if in contravention of the government." Kenneth v. Chambers, 14 Howard 38.

"Contracts permissible by other countries are not enforceable in our courts if they contravene our policy". Oscanyan Vs. Arms Co. 103 U. S. 261,277.

"It is a rule of the common law of universal application, that where a contract express or implied is as to the consideration or the thing to be done contrary to sound policy or good morals, no alleged right founded upon it can be enforced in a court of Justice." Trist Vs. Child, 21 Wallace, 441-448.

The reason upon which rest the numerous decisions of this court which have established the doctrines of "local decisions" has grown out of and is based upon cases coming to this court from the highest courts of the States, and such decisions are a necessary deference to the respective State sovereignties. No such reason exists with reference to decisions of the Supreme Court of Puerto Rico.

Puerto Rico is a possession or dependency of the National Government, which has control over it and the responsibility for its public policy, public health and public welfare of the Island and of its inhabitants.

The three branches of the National Government have the responsibility within their respective spheres of solving the problems which this paramount sovereignty involves. A precedent set at this time may have far reaching

consequences in the near future in connection with the orderly administration of the law and the determination of the public policy of the Island.

Considering Section 1397 of the Revised Civil Code in connection of the provision of the Penal Code and of the Revised Statutes adopted by the Legislative Assembly of Puerto Rico in regard thereto, we respectfully pray the Court to consider the question in the light of National public policy, which in its institutional sense, controls all legislation and jurisprudence in Puerto Rico relating to public health, public welfare and public order.

Respondents urgently pray the Court to reconsider their briefs hereinbefore presented, and to exercise the power that it has to determine by its independent judgment, free from an extreme liberal policy of comity and deference to the Supreme Court of Puerto Rico, and upon such consideration, if the question appears to be one of general law, to decide the case upon its merits.

Respectfully submitted.

San Juan, Puerto Rico, April 1937.

*Francis H. Dexter,*
Counsel for Respondents.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

*Francis H. Dexter,*
Counsel for Respondents.

I hereby state that on the 15th day of April, 1937, I deposited in the General Post Office at San Juan, P. R., a copy of the foregoing Petition for Rehearing, duly addressed to Oscar B. Frazer, Esq. 120 Broadway, New York, his usual and known address, he being the Counsel for Petitioner, the necessary postage having been attached to said communication.

San Juan, P. R., April 15th 1937.

*Francis H. Dexter,*
Counsel for Respondents.

# SUPREME COURT OF THE UNITED STATES.

No. 227.—October Term, 1936.

Jose Matos, Petitioner,
*vs.*
Alonso Hermanos, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 29, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Two sections of the Revised Civil Code of Puerto Rico follow.

1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void. A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.

1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established. This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

Several sections of the Island's Penal Code interdict sale or possession of animals suffering from a contagious disease.

A complaint filed by respondents, Alonso Hermanos, et al., in the District Court of San Juan, December 12, 1929, alleged that they purchased March 1, 1929, from petitioner, Jose Matos, a herd of cattle—122 head—for the lump sum of $18,000.00; although apparently in good condition the cattle were suffering from tuberculosis, a contagious disease; prior to December 6th forty-three had died, twenty-nine were condemned and destroyed by the Health Department. They further declared readiness to return all surviving cattle and prayed that the sale be declared null and void, in accordance with Section 1397 of the Civil Code, also for judgment for the purchase price.

A demurrer invoking the limitation of forty days upon redhibitory actions, prescribed by Code Section 1399, was overruled. An answer followed. This admitted execution of the contract, receipt of the consideration, death and condemnation of the cattle as al-

leged. But it affirmed that tuberculosis was contracted after the sale through improper care; also renewed the claim of prescription.

The trial court found the facts shown by the evidence; concluded the questioned contract was illegal and void, that the action was not subject to the prescription of forty days; and ordered return of the entire purchase price.

Upon appeal the Supreme Court of Puerto Rico ruled the sale contract was not void but voidable at the purchaser's election; its legal effect and the remedy for violation were within the Code provisions relating to redhibitory contracts; the limitation of forty days applied; "that Section 1397 does not exclude the transaction made in this case from the field of warranties." Also, the contract for the purchase of the herd was "individual" or "distributive"—not unitary; as to the dead cows the right to recover the purchase price was prescribed; as to those which survived no right of recovery ever existed. It accordingly reversed the judgment of the District Court and directed dismissal of the complaint.

The Circuit Court of Appeals held the contract of sale illegal—non-existent—as to cows which had died or were condemned; as to them the action was not redhibitory; the prescription of forty days had no application; and it reversed the questioned judgment. With respect to the surviving cows it adopted the interpretation of Section 1397 approved by the Supreme Court. It said: "To summarize: In the trial court the plaintiffs put their claim on the herd basis; they endeavored to rescind the entire transaction and get back the full consideration which had been paid; and they were held entitled to do so. On appeal the Supreme Court held that the sale could not be given this unitary character, but must be considered with respect to the individual animals, and that view stands. In its decision that, as to the tuberculous cattle, a contract was entered into and the plaintiffs' rights were of redhibitory character and subject to the limitation of section 1399, the Supreme Court fell into error."

Accordingly the judgment of the Supreme Court was reversed and the cause remanded to the District Court with instructions to permit an amendment to the complaint. A dissenting opinion approved the Supreme Court's construction of the Code, also its judgment.

The matter is here by certiorari. Manifestly the solution of the controversy must turn upon the meaning and effect of the above quoted sections of the Civil Code—local law of Puerto Rico.

Considering the argument here, the divergent views below, the authorities cited, and "recognizing the deference due to the understanding of local courts upon matters of purely local concern", it becomes impossible for us to entertain "a sense of clear error committed" by the Supreme Court. Following the view so often approved, we think the Circuit Court of Appeals should have accepted and affirmed the ruling there announced after much consideration. *Nadal* v. *May*, 233 U. S. 447, 454; *De Villanueva* v. *Villanueva*, 239 U. S. 293, 299; *Diaz, et al.* v. *Gonzalez, et al.*, 261 U. S. 102, 105.

The judgment of the Circuit Court of Appeals must be reversed; the judgment of the Supreme Court is affirmed.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*